(28,277)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 326.

ROSALYN ZUCHT, BY HER NEXT FRIEND, A. D. ZUCHT, PLAINTIFF IN ERROR,

vs.

W. A. KING ET AL.

IN ERROR TO THE COURT OF CIVIL APPEALS, FOURTH SUPREME JUDICIAL DISTRICT COURT OF THE STATE OF TEXAS.

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1 *Caption.*

THE STATE OF TEXAS,
County of Bexar:

At a Regular Term of the District Court of the 45th Judicial District, begun and holden at San Antonio within and for the County of Bexar and State of Texas, before the Honorable S. G. Tayloe, Judge thereof presiding, and which opened on the 1st day of December, A. D., 1919, and which adjourned on the 31st day of January, A. D., 1920, the following cause came on for trial, to-wit:

No. B-20453.

ROSALYN ZUCHT, by Next Friend, Plaintiff,

vs.

W. A. KING et al., Defendants.

2 *Plaintiff's Second Amended Original Petition.*

In District Court of Bexar County, 45th Judicial District of Texas.

No. B-20453.

ROSALYN ZUCHT, by Next Friend,

vs.

W. A. KING et al.

Plaintiff's Second Amended Original Petition.

Filed Jan. 20, 1920.

Now comes Rosalyn Zucht, by A. D. Zucht next friend, plaintiff in the foregoing styled and numbered cause; and, by leave of the court, files this her second amended original Petition in lieu of the original petition filed in this cause on March 24th, 1919; and, for such first amended original petition, says that said plaintiff by said next friend, complains of W. A. King, Ray Lambert, E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. E. W. McCamish, Mrs. Henry Guerra, Mrs. Dan Leary, Paul Scholz, and Marshall Johnson; and avers that:

1. All the parties, plaintiffs and defendants, reside in Bexar County, Texas.

2. There is a city in said Bexar County known as the City of San Antonio, which is duly incorporated by a special act of the Legislature of the State of Texas as a city having over ten thousand inhabitants, with territorial limits six miles square.

3. There is also in said county an independent school district known as the San Antonio Independent School District having the same territorial limits as the said City of San Antonio, which said independent school district is also duly incorporated by a special act of the Legislature of Texas; and its affairs are controlled by a special body of officers called the San Antonio School Board.

4. The said City of San Antonio is a city having over 100,000 inhabitants and has a street car system operating on and over its principal streets transporting passengers on its cars during each
3 and every day and for the greater part of each and every night, which cars have seats where the passengers, consisting of men, women and children, are seated in the closest juxtaposition; and said cars are daily and nightly crowded with passengers to such an extent frequently that there is hardly standing room in such cars; the passengers being almost literally packed in said cars. Said City has also a great number of theaters and other buildings where public shows are daily and nightly conducted and where great crowds of men, women, and children gather daily and nightly for entertainment, and are seated in close personal contact. Likewise said City has a great number of churches where crowds of people, consisting of men, women, and children are in close personal contact at least once a week and frequently oftener. Said City also has within its limits quite a number of railway passenger depots where large crowds of people, consisting of men, women, and children assemble in close personal contact daily and nightly. There is also in said City a public motor car service operating on a number of the principal streets daily and nightly transporting passengers, consisting of men, women, and children which passengers are in the closest personal contact frequently setting in each other's laps. There are also in said City a large number of factories where large numbers of men, women, and children are employed in close personal contact each and every day of the week except Sundays. There are in said City a large number of laundries where large numbers of men, women, boys and girls are employed working daily in close personal contact. There is also in said City what is known as the Mexican quarter where the Sanitary conditions are not good and where approximately 20,000 of the inhabitants of the said City reside closely crowded and where large crowds assemble in close personal contact daily and frequently at night. Said City also has a number of public parks where crowds of men, women, and children gather frequently for recreation and where
4 there are swimming pools in which great crowds of men, women and children bathe daily and nightly during the summer season. And on the principal streets of said city there are great crowds of people on the sidewalks daily and nightly in close personal contact, frequently amounting to jams. Said City has a large number of private educational institutions within its limits where children and persons over the age of twenty-one years are educated. There *are* also have been for many years a great number of public free school buildings in said City where public free schools

are conducted for the benefit of the children who are entitled to attend the same for educational purposes under the constitution and laws of the State and under the provisions of the special act of the Legislature incorporating the said San Antonio Independent School District. Said public free schools are under the law of this State. There are and have been for many years in said City a large number of private schools and institutions where great numbers of pupils both under the age of twenty one years and over the age of twenty one years constantly attend now and have constantly attended and are taught and have been taught in various branches of learning and skill, and there are now and have been many other persons employed in, connected with, and attendant upon said private institutions.

5. By Section 60 of the special act of the Legislature of the State of Texas incorporating the said City of San Antonio as a municipal corporation the City Council of said City is clothed with the power as follows:

"To prevent the introduction of contagious diseases into the City, to make quarantine laws for that purpose and to enforce the same within five miles of the city, and to make all ordinances and regulations to prevent the spread of any contagious diseases within the city limits; to enforce vaccination and to establish pest houses, and to regulate the establishment of private hospitals."

And said special act of the Legislature confers upon said City Council and said municipal corporation no other power with reference to vaccination than the said power set forth in said Section 60.

6. The said City or its City Council has no power or control over the public free schools in said City, but the exclusive control and management of said public free schools are expressly vested in the said San Antonio Independent School District and the said San Antonio School Board by the Special Act of the Legislature incorporating said San Antonio Independent School District and San Antonio School Board.

7. No power is conferred upon said San Antonio Independent School District or said Antonio School Board with reference to vaccination either in express terms or by necessary implication by the said special act of the Legislature incorporating the same.

8. Under the said special act of the Legislature incorporating the said San Antonio Independent School District and San Antonio School Board all persons between the ages of seven years and twenty one years have the right to attend the public free schools in said district, receive instruction therein and are entitled to all the benefits of the free school fund furnished by the State and the public free school fund derived from taxation in said district for free school purposes. Said San Antonio School Board is authorized and empowered by the terms of said special act incorporating said independent school district and school board to levy taxes on all the

property in said district subject to taxation for the purposes of acquiring grounds for public free school buildings, constructing school buildings thereon and equipping the same and for maintaining public free schools in said district during nine months of each and every year; and said school Board has exercised said powers for many years and has levied taxes and collected the same for many years and is still so doing.

6 9. The said public free schools in said district are conducted in a thoroughly sanitary manner and every reasonable precaution has been taken to protect the health of the pupils attending the same. The grounds and buildings of said public free school in said district are in most excellent sanitary condition and are so kept all the time. All the public free school buildings in said district are provided with separate individual seats on which the pupils and all other persons connected with said schools are seated separate and apart from each other and are not in personal contact. The same is true with reference to the private schools and other educational institutions in said city.

10. The said City and its said City Council have never attempted to enforce vaccination generally among the inhabitants of said city nor even among the children generally of said city, but undertook to arbitrarily discriminate against the pupils who attend the schools and educational institutions in said city and the persons connected with said schools and institutions in said city, including the pupils attending the same and the other persons connected therewith, by adopting an ordinance as follows:

"Section 25. No child or other person shall be permitted to attend any of the public schools, or any place of education within this city, unless such child or other person shall first present a certificate from some duly qualified physician to the city physician that such child, or other person, has been successfully vaccinated within six years preceding the time at which such child, or other person, desires to attend school. Such certificate shall give a description of such child, or person, age and nativity, and kind of virus used, for which purpose, the city physician shall furnish the necessary blanks to all persons requiring the same.

Section 26. The city physician, or his assistant, shall give a certificate of such vaccination, or certify to the correctness of
7 such certificate presented from some other physician, and such certificate or certified certificate, shall be presented to the superintendent, principal, or teacher of the school at which each child, or person seeks to be admitted before admission.

Section 27. Any person sending or attempting to send a child to any school or place of education within this city, without having it vaccinated in accordance with the provisions of this ordinance, and any physician giving a false certificate, and all persons admitting any child or other person to attendance in any such school or place of education without such certificate of vaccination, shall be guilty

of a misdemeanor, and upon conviction therefor before the recorder, shall be fined in any sum not less than ten dollars ($10.00) nor more than one hundred dollars ($100.00) for such offense, and each day such offense continues shall be deemed a separate offense, and upon failure to pay such fine such person may be imprisoned in the city jail not less than ten days nor more than thirty days."

Section 1. That it shall be the duty of all persons conducting any place, or institution, of education within the limits of the City of San Antonio, to furnish the Board of Health, whenever so required, a list by name of all the teachers, pupils, and employes and other persons connected therewith in any capacity whatsoever, and statement duly certified by affidavit of such person or persons so conducting such place or institution or other person cognizant of such facts showing dates, time and place of vaccination of all teachers, pupils employes and other persons connected therewith, if vaccinated, and, if not vaccinated, such statement shall show, provided that the Board of Health may require certificate of some duly qualified physician that such teachers, pupils, employes and other persons connected therewith have been successfully vaccinated within seven years preceding the date of such report, such certificate to give description and other particulars to be furnished on such blanks as provided in Section 25 of Chapter 26.

"Section 2. Whenever, in the opinion of the Board of Health, it is necessary for the public health, or the health of any such place or institution of education set forth in Section 1 of the ordinance that all such teachers, pupils, employes and other persons connected therewith be vaccinated, said Board may require such vaccination within such period of time and under such regulations as said Board of Health may require."

"Section 3. Any person conducting any place or institution of education, who shall fail or refuse to furnish the list or statement or physician's certificate provided for in Section 1 of this ordinance, or any persons whomsoever who shall fail to comply with the requirements of the Board of Health provided for in Section 2 of this ordinance, shall be deemed guilty of a misdemeanor and upon conviction therefor, shall be fined in any sum not less than Ten ($10.00) Dollars, or more than One Hundred ($100.00) Dollars, for such offense, and upon failure to pay such fine, such person may be imprisoned as provided for in the City Ordinances."

"Section 4. Every person being the parent or guardian, or having the care, custody or control of any minor or other individual, shall (to the extent of any means, power and authority of said parent, guardian, or other person that could properly be used or exerted for such purpose) cause and procure such minor or individual to be promptly and effectively vaccinated, that the minor or individual shall not be liable to take the small-pox."

"Section 7. Any person violating any of the provisions of Sections 2, 3, 4, 5 and 6, shall be deemed guilty of an offense, and upon

conviction shall be fined not less than five dollars ($5.00) nor more than one hundred dollars ($100.00), and in default of payment be committed to prison any number of days, not exceeding thirty, in the discretion of the recorder."

9 The said ordinance with reference to the pupils, teachers, employes or other persons connected with public schools and other educational institutions in said city is the only ordinance or regulation that has ever been adopted by the said city to enforce vaccination.

Plaintiff shows that the provisions in said so-called ordinance undertaking to inflict the punishment of a fine and imprisonment for violations thereof, have never been enforced and there has been not the slightest attempt to enforce the same though ever since the enactment of the said so-called ordinance, which was not less than thirteen years ago, many pupils and others have been continually attending public and private schools, places, and institutions of education public and private in said city without having been vaccinated and without ever having presented any certificates of vaccination as required by the terms of said so-called ordinances, and this with the full knowledge of the defendants; and said provisions for inflicting the punishment of a fine and imprisonment for violations of said so-called ordinance have always been treated and regarded by the officials of said city as a dead letter.

11. No valid reason existed or does exist for said discrimination. But on the contrary, there was and is much more danger of the contagion of small pox (which the advocates of vaccination claim vaccination will prevent) spreading from the close personal contact of persons in the assemblages and in the places other than the schools and educational institutions in said city hereinbefore named than there is such danger from the contact of the pupils, teachers, employes and other persons in said schools and educational institutions. Especially is this the case in the said Mexican Quarter of said city where the danger of the breaking out of the disease called small pox is infinitely greater than in the said schools and educational institutions.

12. The said ordinance is not and was not intended to be
10 a mere temporary measure to be in force only when there is an epidemic of smallpox in said city or when such an epidemic is imminent; but purports to be in force and is intended to be in force all the time whether or not there is a single case of smallpox in said city, in said county or even within the State.

13. The said San Antonio Independent School District and the said San Antonio School Board have no rule with reference to vaccination nor had they any such rule at the times hereinafter set forth.

14. The said Rosalyn Zucht is of the age of 15 years, and was and is entitled to attend the public free schools in said independent school district and to receive her proportionate part of the benefits of the

public school fund provided under the laws and Constitution of the State of Texas including the fund produced by the said special tax in said district; and has been attending said public free schools during the past year and during the months of January and February of the present year 1919, the public free school she has been attending being known as the Brackenridge High School in said independent school district.

15. The said Rosalyn Zucht never has been vaccinated nor is she willing to be vaccinated nor are her parents willing that she should submit to vaccination because she and her parents fear that vaccination will endanger her health and life. A large number of other pupils who had not been vaccinated, and had furnished no certificates of vaccination were attending said school and other public free schools in said district during the time that she was attending said school, and they were permitted to continue to attend said schools without having been vaccinated and without having furnished certificates of vaccination after she was expelled from said school as hereinafter set forth. She and her parents have a permanent home and reside in a locality in said City where there never has been single case of smallpox, and they have continuously resided in said locality, for many years. She has never been exposed to
11 the contagion of smallpox, and the sanitary conditions in said locality where she and her parents have their said home are excellent, being a quiet residence portion of said city where the inhabitants own their own homes and there is no crowding of houses close together and no crowds gather on the streets or elsewhere in said locality.

16. There is no epidemic of smallpox in said city now nor has there been such an epidemic in said city for more than ten years, *not* is there any such epidemic imminent nor *nor* was there any such epidemic imminent at the time she was expelled from said school. Neither has there been any case of smallpox in said school that she was attending.

17. Yet, on, to wit: March 3rd, 1919, the present year, the defendants hereinbefore named conspired together to expel her from school, and said defendants and each of them, acting wantonly and maliciously, expelled her, the said Rosalyn Zucht, from said school; and the said defendants and each of them, acting wantonly and maliciously refuse to permit her to attend said school any longer and prevent her from attending said school or any other public school in said city any longer unless she will submit to vaccination and the said defendants and each of them have thereby deprived her of the benefits of an education and of the benefits of her proportionate part of said public free school fund provided by the Constitution and Laws of Texas.

18. The said Ray Lambert is the Sanitary Commissioner of said city having the control and management, at least ostensibly, of the Health Department of said city, the said W. A. King is the Health Officer, City Physician and the active manager of the Board of

Health of said city, the said E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. Dan Leary, Mrs. Henry Guerra, and Mrs. E. W. McCamish, are members of and constitute the San Antonio School Board having the exclusive control and management of the public free schools in said San Antonio Independent School District, the said Paul Scholz is the Business Agent of said San
12 Antonio School Board, and the said Marshall Johnson is the principal having charge and control of the said public free school that the said Rosalyn Zucht has been attending and from which she was expelled as aforesaid.

19. By the terms of the said special act of the Legislature of Texas incorporating the said City of San Antonio as a municipal corporation by said special act were and are vested in the City Council of said city, composed now of what are called commissioners of whom the said Ray Lambert is one; and no legislative powers or authority were vested in said Board of Health; nor did nor does said City Council have any power or authority to delegate their legislative powers and authority to said Board of Health or to any one else.

20. The said defendants pretend to have acted in their official capacities in expelling the said Rosalyn Zucht from said school and in refusing to permit her to attend the public free schools of said independent district any longer unless she would submit to be vaccinated, and profess to have acted in obedience to said ordinance. But the said plaintiff avers that this is not and was not true. Many other pupils and other persons were attending the said school that she was attending as well as the other public free schools of said independent school district and other educational institutions that had not been vaccinated and had not complied with said ordinance and had never presented certificates of vaccination as required by said ordinance, and yet said other pupils and persons were permitted to continue to attend said school and said other schools and other educational institutions after said plaintiff has been expelled without having complied with said ordinance and without having been vaccinated and without having presented any certificates of vaccination as required by said ordinance. And there is and always has been not even a pretense of enforcing said ordinance against the pupils of and the persons connected with the private schools and educational institutions in said city; but the pupils of and the persons connected with said private schools and educational
13 institutions in said city are now and continuously have been permitted to attend the same without having been vaccinated and without having presented any certificates of vaccination as required by said ordinance except that, when the plaintiff herein and her brother undertook to attend one of said private schools without having been vaccinated, the authorities of said city, being the defendants herein and especially the said W. A. King, notified the principal of said private school that, if he continued to permit the plaintiff and her brother, Arthur Zucht, to continue to attend said private school, they would close his school, and thereupon the plaintiff and her brother was compelled to cease attending said private

school. The conditions and circumstances as to said other schools and educational institutions with reference to smallpox were and are precisely the same as those as to the school plaintiff was attending.

The foregoing facts are and were well known to the defendants and each of them, yet the defendants and each of them wantonly and maliciously discriminated against plaintiff because plaintiff would not submit to vaccination and for other unlawful reasons, and wantonly and maliciously refuse to permit plaintiff to attend any of said public schools.

21. By reason of having been expelled from said public free school and by reason of being refused permission to attend any of the public free schools in said city, the plaintiff has been humiliated and put to shame and her feelings have been injured and her standing in the community has been injured; and thereby plaintiff has been damaged by the defendants and *be* each of them in the sum of, to wit: ten thousand dollars.

22. The said ordinance, by reason of discriminating against the pupils of and the other persons connected with said schools and other education institutions in said city and undertaking to compel the pupils attending and the other persons connected *w*herewith
14 to submit to vaccination as a condition precedent to their being permitted to attend such schools and other educational institutions or to be connected therewith and to compel parents, guardians and other persons having the care, custody or control of other persons to cause or procure the persons under their care, custody or control to be vaccinated, and thus placing a burden upon such pupils and other persons and others connected with said schools and other educational institutions in said city and parents and guardians and persons having the care or other persons that is not placed upon other inhabitants of said city in like conditions and under like circumstances, is unreasonable, deprives such pupils and other persons, including plaintiff, of their rights and privileges without due course of the law of the land in violation of Section 19 of Article 1 of the Constitution of the State of Texas; and said ordinance denies to such pupils including plaintiff herein, and other persons connected with said schools and other education institutions in said city the equal protection of the laws in violation of the XIV Amendment to the Constitution of the United States of America; and said ordinance is, therefore, absolutely void.

23. Further, said ordinance, by undertaking to leave to the arbitrary discretion of said Board of Health when or under what circumstances vaccination shall be enforced against the pupils of and the other persons connected with said schools and other educational institutions in said city and in leaving it to the arbitrary discretion of said Board of Health as to which of such schools and educational institutions in said city vaccination shall be enforced without providing any rule by which said Board is to be guided in its action and without providing any safeguards against partiality and oppres-

sion, is absolutely void, being in violation of the XIV Amendment to the Constitution of the United States.

24. The said partial, discriminatory and oppressive manner in which said ordinance has always been administered by the authorities charged with its administration and is still being administered is a denial by the State of Texas through its executive department to plaintiff and others of the equal protection of the laws in violation of the XIV Amendment to the Constitution of the United States of America.

26. Unless restrained and prohibited as hereinafter prayed, the said defendants and each of them will continue to discriminate against plaintiff in the manner hereinbefore alleged and will continue to exclude her from attending said public free schools in said city and will continue to deprive her of her said right, privileges and benefits; and will continue to enforce against plaintiff said void ordinance and will continue to and let the said other pupils and persons attend said schools and other educational institutions without complying with said so-called ordinance.

Premises considered, plaintiff by her said next friend, sues, and all the defendants herein having already been duly served with citation herein and having already appeared and answered herein, plaintiff prays that upon final hearing, plaintiff have judgment against the said defendants and against each of them for the amount of her said damages and all costs of this suit; that a writ of injunction issue perpetually restraining and prohibiting the defendants and each of them from discriminating against plaintiff; and that a writ of injunction issue restraining and prohibiting the defendants and each of them from enforcing or attempting to enforce the void ordinance against plaintiff; and that a peremptory writ of mandamus issue compelling the defendants and each of them to admit plaintiff to attendance in and upon said public free schools. Plaintiffs also prays for such relief, general or special, as plaintiff maybe entitled to under the facts hereinbefore set forth.

DON A. BLISS,
Attorney for Rosalyn Zucht,
By Next Friend, A. D. ZUCHT,

Filing.

Filed Jan. 20, 1920.

OSCEOLA ARCHER,
Clerk of the District Courts,
Bexar County, Texas.
By GEO. W. HUNTRESS, JR.,
Deputy.

16 *Third Amended Original Answer of Defendants, E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. E. W. McCamish, Mrs. Henry Guerra, Paul Scholz, and Marshall Johnson.*

In the District Court, 45th Judicial District, Bexar County, Texas.

No. B-20453.

ROSALYN ZUCHT, by Next Friend, A. D. ZUCHT,

vs.

W. A. KING et al.

Third Amended Original Answer of Defendants, E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. E. W. McCamish, Mrs. Henry Guerra, Paul Scholz, and Marshall Johnson.

Filed Dec. 2, 1919.

To the Honorable Judge of said Court:

(A) Come now the defendants, E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. E. W. McCamish, Mrs. Henry Guerra, Paul Scholz, and Marshall Johnson, and with leave of the Court first had, file this their Third Amended Original Answer, and for answer herein defendants show that from the face of plaintiff's pleadings it appears that the San Antonio Independent School District is a necessary and proper party to this suit, and that as the same has not been made a party that this suit should be abated for that reason, and of this pray judgment of the Court, and ask that said suit be abated.

B. W. TEAGARDEN,
R. L. BALL,
Attorneys for the Defendants Named.

(B) These defendants show further, by way of abatement, that the San Antonio Independent School District is an Independent School District, having as its governing body seven trustees, six of whom have been joined in this suit; that the other trustee, to-wit, Mrs. Harriet N. Leary, a resident of Bexar County, Texas, is a necessary and proper party to this suit, and that plaintiff has failed to make her a party to this suit; that the charter or act incorporating
17 the San Antonio Independent School District is a public act, and provides that the affairs of said School District shall be controlled and handled by seven duly elected trustees, to be known as the San Antonio Board of Education; that such trustees have control of the management of said schools; that they are the legal representatives of said district, and that there are seven of such trustees duly elected; that all of said trustees are necessary parties

to this suit, in view of the relief prayed for by plaintiff, and that therefore in view of the fact that Mrs. Harriet N. Leary, who is a legally, qualified and acting member of said Board, duly elected, has not been made a party to this suit, the same should be abated, and defendants accordingly pray that the cause be abated.

B. W. TEAGARDEN,
R. L. BALL,
Attorneys for the Defendants Named.

I, B. W. Teagarden atty. pr. above defdts., being duly sworn, state upon oath that the facts set out in the foregoing plea in abatement on account of Mrs. Harriet N. Leary are true.

B. W. TEAGARDEN,

Sworn to and subscribed before me, the undersigned authority, this 17th day of June, A. D. 1919.

LENA STEIN,
[SEAL.] *Notary Public in and for Bexar County, Texas.*

(C) These defendants hereinbefore named show to the Court that it appears from plaintiff's pleading that plaintiff is complaining of the acts and decisions of certain teachers, principals and subordinate officers and school trustees of the San Antonio Independent School District, and that it is not alleged that any appeal for relief therefrom has been taken to the Superintendent of Public Instruction of Texas, or to the State Board of Education of Texas, as is required by law in such cases, and that therefore plaintiff is not entitled to the writ of mandamus as prayed for, and of this these defendants pray judgment of the Court that plaintiff's suit for mandamus be abated.

18

B. W. TEAGARDEN,
R. L. BALL,
Attorneys for the Defendants Named.

(D) Answering further, if answer be required, these defendants show to the Court that the pleading of the plaintiff in this suit is insufficient in its allegations to show any cause of action against these defendants, or either of them, and of this pray judgment of the Court.

B. W. TEAGARDEN,
R. L. BALL,
Attorneys for Defendants Named.

(1) And for further answer, if answer be required, these defendants deny all and singular the allegations contained in plaintiff's pleading, and demand strict proof thereof, and pray that plaintiff take nothing by this suit, and that the relief sought by plaintiff be denied, and that they go hence without day, and recover their costs.

(2) And for further answer, if answer be required, these defendants show that the City of San Antonio, as a municipal corporation, which is co-extensive with the San Antonio Independent School

District, which was created by a special public act of the Legislature, through its proper authority is clothed with the power to prevent the introduction of contagious diseases into the City, to make quarantine laws for that purpose and to enforce the same within the five miles of the City, and to make all ordinances and regulations to prevent the spread of any contagious disease within the City limits; to enforce vaccination and to establish hospitals and pest-houses, and to regulate the establishment of private hospitals; that said City has power and control over the public health within the confines of said City, under its charter, or the special act incorporating
19 the said City. There is a valid, existing ordinance passed by the proper authorities of the City of San Antonio with reference to the vaccination of school children, which has been in force and effect continuously for several years prior to March 1st, 1919, and which is still in force and effect, which, in substance and effect, is as follows:

"Section 25. No child or other person shall be permitted to attend any of the public schools, or any place of education within this city, unless such child or other person shall first present a certificate from some duly qualified physician to the city physician that such child or other person has been successfully vaccinated within six years preceding the time at which such child or other person desires to attend school; such certificate shall give a description of such child or person, age and nationality and kind of virus used, and such other information as the city physician may require, for which purpose the city physician shall furnish the necessary blanks to all persons requiring the same.

"Section 26. The city physician, or his assistant, shall give a certificate of such vaccination, or certify to the correctness of such certificate presented from some other physician, and such certificate, or certified certificate, shall be presented to the superintendent, principal or teacher of the school at which such child or person seeks to be admitted, before admission.

"Section 27. Any person sending or attempting to send a child to any school or place of education within this city, without having it vaccinated in accordance with the provisions of this ordinance, and any physician giving a false certificate, and all persons admitting any child or other person to attendance in any such school or place of education without such certificate of vaccination, shall be guilty of a misdemeanor, and upon conviction therefor before the
20 recorder, shall be fined in any sum not less than ten dollars ($10.00) nor more than one hundred dollars ($100.00) for such offense, and each day such offense continues shall be deemed a separate offense, and upon failure to pay such fine such person may be imprisoned in the city jail not less than ten days nor more than thirty days."

That said ordinance is a legal and valid ordinance operating within the limits of the City of San Antonio.

(2a) That the whole of the ordinance of the City of San Antonio, pleaded as Sections 1 and 2 in the pleading of plaintiff, is not set out in plaintiff's pleading; that it was passed, approved and enacted on or about May 28th, 1906, and that neither at said date, nor since, has there been a codification or re-enactment of the ordinances of the City of San Antonio, as pleaded by plaintiff; that said last named ordinance neither expressly nor impliedly repealed Sections 25, 26 and 27 of the ordinances of the City of San Antonio, heretofore set out; that the said ordinance of May 28th, 1906, in all its terms, is as follows:

"*An Ordinance Defining and Establishing the Authority of the Board of Health on 'Viccination Regulations' as Applicable to Education Institutions in the City of San Antonio.*

"Be it ordained by the City Council of the city of San Antonio.

"Section 1. That it shall be the duty of all persons conducting any place or institution of education within the city, to furnish the Board of Health, whenever so required, with a list, by name of all teachers, pupils, employees, and other persons connected therewith in any capacity whatsoever, a statement duly verified by affidavit of such person or persons so conducting such place or institution or other person cognizant of such fact, showing date, time and place of vaccination of all such teachers, pupils, employees and other persons connected therewith, if vaccinated, and if not vaccinated such statement shall so show; provided that the Board of Health
21 may require certificate of some duly qualified physician that such teachers, pupils, employees and other persons connected therewith have been successfully vaccinated within seven years preceding the date of such report, such certificate to give such description and other particulars and be furnished on such blanks as are provided in Section 25 of Chapter 26 of the Revised Criminal Ordinances of the City of San Antonio.

"Section 2. Whenever in the opinion of the Board of Health it is necessary for the public health or the health of any such place or institution of education set forth in Section 1 of this ordinance that all such teachers, pupils, employees or other persons connected therewith be vaccinated, said board my require such vaccination within such period of time and under such regulations as said board of health may require.

"Section 3. Any person conducting any place or institution of education, who shall fail or refuse to furnish the list or statement or physician's certificate provided for in Section 1 of this ordinance, or any person whomsoever who shall fail to comply with the requirements of the Board of Health provided for in Section 2 of this ordinance, shall be deemed guilty of a misdemeanor and upon conviction therefor, shall be fined in any sum not less than Ten ($10.00) Dollars, or more than One Hundred ($100.00) Dollars for such offense, and each day such offense continues, shall be deemed a

separate offense, and upon failure to pay such fine, such person may be imprisoned as provided for in the City Ordinances.

"Passed and approved, this 28 day of May, A. D. 1906."

(2*b*) These defendants show further that the Board of Health of the City of San Antonio, Texas, has heretofore, on or about February 4, 1916, lawfully promulgated a rule or regulation for the health of said city, and gave notice thereof to the School Board of the San Antonio Independent School District, and that said rule or
22 order has never been revoked nor cancelled. Said order or regulation of said Board of Health is as follows:

"February 4, 1916.

"Motion by Drs. Hull and Shropshire instructing the Secretary to inform the School Board that the Board of Health demands that the laws and ordinances governing vaccination of all persons attending any school be rigidly enforced, carried.

W. A. KING,
President.

W. W. HERRING,
Secretary."

That the ordinances of the City of San Antonio duly passed, provided at, before and since February 15, 1919, as follows:

"Section 1. The board of health of the city of San Antonio shall consist of a president and four members, to be appointed by the mayor. The mayor and city physician shall be ex-officio members of the board of health, and shall be entitled to a voice and vote in all its proceedings.

"Section 2. The members of the board of health, as herein provided for, shall serve without pay, except during the prevalence of an epidemic when they each shall receive five dollars ($5.00) for each meeting so attended.

"Section 3. It shall be the duty of the board of health to hold regular sessions at least once a month in the council chamber at the city hall, and these and all other meetings shall be attended by the assistant city clerk, who shall act as secretary and keep a record of the proceedings.

"Section 4. The board of health are subject to the general ordinances of the city council. They shall have general supervision
of all matters appertaining to the sanitary condition of the
23 city, including the city hospital, jail, alms houses, schools, and all health institutions, and shall see that all the sanitary ordinances of the city are strictly enforced."

(2*c*) These defendants show further that the City of San Antonio, by its legislative body, by ordinance duly and lawfully passed, as set out in the revision or codification of the ordinances of said City at Chapter 25, Sections 4 and 7, as follows:

"Section 4. Every person being the parent or guardian, or having the care, custody or control of any minor or other individual, shall (to the extent of any means, power and authority of said parent, guardian or other person that could properly be used or exerted for such purpose) cause and procure such minor or individual to be promptly and effectively vaccinated, that such minor or individual shall not be liable to take the small-pox."

"Section 7. Any person violating any of the provisions of Sections 2, 3, 4, 5 and 6, shall be deemed guilty of an offense, and upon conviction shall be fined not less than five dollars ($5.00) nor more than one hundred dollars ($100.00), and in default of payment be committed to prison any number of days, not exceeding thirty, in the discretion of the recorder."

at or prior to and since February 15th, 1919, had provided, and does now provide that school children shall be vaccinated, and that it is an offense, according to said ordinance, for a parent to prevent said vaccination, or to fail to use his means and power to have such child vaccinated.

These defendants show that plaintiff and her father, the next friend, A. D. Zucht, in this suit, have at all times for several years conspired and confederated together to violate said ordinance, and that the next friend in this suit has failed and refused to permit said plaintiff to be vaccinated, and would not, during such times, nor now, permit plaintiff, his minor child, to be vaccinated.

24 (3) Defendants further show that the San Antonio Independent School District, through its Board of Trustees, known as the San Antonio Board of Education, by the act incorporating and creating the same, which is a public act, is granted unto it, the said Board, the right to pass vaccination rules with respect to school children, and that said Board has passed, and now has in force and effect as a rule of said Board, and had for a long time prior to March 1st, 1919, and since that date, the following rule:

"Be it resolved by the San Antonio Board of Education of the San Antonio Independent School District that the superintendents and teachers of the schools of the San Antonio Independent School District be, and are hereby instructed to enforce and obey and comply with the ordinance of the City of San Antonio with reference to vaccination of school children, and are instructed to refuse admittance to the schools of the said district, and to prevent further attendance thereat of children not complying with the vaccination ordinance of the City of San Antonio, as set out in Sections 25 and 26, of Chapter 26, of the ordinances of said City; this Board also hereby adopting the language and provisions of said Sections 25 and 26, on vaccination as applied to public schools as a rule or regulation to be observed by the teachers and superintendents of the schools within said district."

That Sections 25 and 26 referred to in said rules and regulations of said Board of Education are those sections 25 and 26 heretofore set out in this pleading. That said rule at and before March 1st, 1919, and since said date, was a valid, binding and lawful rule.

(4) These defendants show further that for a long time prior to March 1st, 1919, and since said date, there has been small-pox in the City of San Antonio, and within the limits of said School District, and there was danger at such time of small-pox spreading and being communicated from one person to another in the City of San Antonio, and there is now such danger, and it is necessary for the preservation of the public health, and the preservation of the welfare of the City of San Antonio and its citizens, and the children thereof, that proper precautions should be taken to prevent the spread of the disease of small-pox, and that the conditions which have existed in and about the City of San Antonio for a long time prior to March 1st, 1919, and continuously since said date with reference to small-pox, constitute a menace to the public health of the inhabitants of the City of San Antonio, and that the conditions at all times existing in the confines of the City of San Antonio continuously for several years in the past, and at this time, and as will exist in the future, are such with reference to the disease of small-pox that they constitute a menace to the public health.

(5) These defendants show further that the school children in the City of San Antonio range in age from approximately eight to nineteen years, and that such children have less resisting power to the ravages of the disease of small-pox than matured persons. These defendants show further that the City of San Antonio is crowded with transients and strangers, and that into the City of San Antonio there are constantly going and coming people from all parts of the country, and especially people from Mexico and border towns and nearby towns, and that this condition of transiency is permanent, and will continue in the future.

(6) Defendants show that people and chhildren are coming to and from San Antonio from all parts of the country. Defendants show further that in the past there has been small-pox continuously existing in some of the nearby Counties to San Antonio, and especially the border Counties in the State of Texas, and that it has been more or less existent in the time past, and will be in the future in the Mexican population in the neighboring Counties, and especially the bordering Counties of Texas, and that this Mexican population has continually and will continually move about from one place to another, and that great numbers of them come and go to and from San Antonio, Texas, and further, that there are a great number of people from the Republic of Mexico at all times, coming to and going from the City of San Antonio, Texas, and that this conditions has continued in the past, and will continue in the future. That small-pox has been more or less

prevalent at all times in the past among the Mexican population, and the transient Mexican population of adjacent County or Counties to San Antonio, and those Counties between San Antonio and the Mexican border of Texas, and that a great deal of small-pox in times past has been brought in by transients from the Republic of Mexico to Texas, to nearby border towns, and to San Antonio, and that such conditions exist now as existed in the past, and will continue to exist. That within the limits of the City of San Antonio there are approximately forty to fifty thousand inhabitants, commonly termed "Mexicans". That this number of such people have lived in San Antonio for the past several years, and will continue to live here in the future. That said Mexican population of San Antonio, Texas, is continually shifting and changing, and that such character of population continually moves into and out of town in great numbers, and a great percentage of such population is more or less transient, going to the nearby Counties at times in the year to work upon ranches, farms, and then returning from time to time to the City of San Antonio. That there is a great deal of traveling back and forth between San Antonio and nearby Counties of this character of population; that this has existed in the past, and will continue to exist in the future. That there are a great many sections in the City of San Antonio of this class of population where the conditions are unsanitary, where the housing is crowded, and conditions are such as to be unusually likely to bring about the spread of contagious and infectious diseases. That this condition has existed in the past, and will continue to exist in the future. That this character of population, to-wit, the Mexican population, is very secretive as to contagious diseases, among them especially the disease of small-pox. That they continually attempt to hide
27 small-pox existing among them, and permit the inmates of their houses to associate with other people, and permit their children to attend schools even when they have small-pox in the house or in the family. That this condition has existed in the past for years, and will continue to exist in the future in the city of San Antonio. That the City of San Antonio, from its location with internal conditions, and the character and kinds of its population, its nearness to the border, nearness to nearby Counties in which there is more or less prevalence at all times of small-pox, unsanitary conditions in houses among certain classes of the population, render the position of the City of San Antonio peculiarly dangerous at all times to the menace of small-pox, so much so that it requires utmost vigilance and precaution to properly protect the health of its inhabitants, as well as that of the school children attending the schools within said City from communication from contagious and infectious diseases, especially that of small-pox.

(7) Defendants show further that there has continually existed small-pox in the County of Bexar, in which the City of San Antonio is located, and in the City of San Antonio, and in the San Antonio Independent School District, during the months of February, March, April and May of 1919, and that there has existed small-pox in said

months in nearby Counties to and from which people have been continuously traveling.

(8) Defendants show therefore that there is and has been danger of an epidemic of small-pox in the City of San Antonio, and that existing conditions with reference to small-pox constitute a menace to the public health. That this condition has existed for a long time past, and will continue to exist in the future.

(9) Defendants further allege that the purpose of vaccination is to prevent the spread of small-pox and prevent people from taking small-pox, and that vaccination has the effect of preventing the spread of small-pox, and preventing people from taking it a communicable disease.

(10) Defendants further allege that there is danger of small-pox spreading and being communicated from one person to another in the City of San Antonio and in said Independent School District at this time, and there has been for months past, and will be in the future, and that it is proper and necessary for the preservation of the public health, and the preservation of the welfare of the City of San Antonio and its citizens, and the children thereof, that proper precautions should be taken to prevent the spread of the disease of small-pox among school children.

(11) Defendants further show that there has been no discrimination against the plaintiff in this case. Defendants show that *that* plaintiff and her father have at all times in the past refused to permit the plaintiff to be vaccinated, and plaintiff at no time has been, since she has been attending school, nor her father either, has been willing for plaintiff to submit to vaccination for small-pox.

(12) Defendants show further that no school children were knowingly permitted to attend the schools in March and April, 1919, who has refused to comply with the said City ordinance as to vaccination, and that if for any reason in March or April any child was attending school unvaccinated, there had been no willful refusal to comply with the rule on the part of such child, and that prior to April 1st, 1919, a compliance with said ordinance had been made by such school child or school children, and that plaintiff would not have submitted to vaccination at any such time or times, and would not comply with the rules then or now with respect to vaccination, and her father, A. D. Zucht, suing as next friend, would not permit her to comply with the rules either then or now.

(13) Defendants show further that A. D. Zucht, the father of plaintiff, who controls and dominates the plaintiff, who is a young minor, has at all times conspired and confederated with his children, and with plaintiff, and aided, abetted and advised the plaintiff in a violation of the said ordinance of the City of San Antonio, and with a view of escaping a compliance with said ordinance, and has aided, abetted and advised the violation of said ordinance by the plaintiff, and has at all times attempted to escape compliance with said ordinance, and avoided the rules and regula-

tions of the said School Board. To this end defendants show that heretofore, about February or March, 1914, A. D. Zucht, as next friend for the plaintiff in this suit, filed a suit in the 73rd District Court of Bexar County, Texas, No. B-7190, seeking an injunction to prevent the enforcement of said ordinance, *and seeking an injunction to prevent the enforcement of said ordinance,* and seeking an injunction to prevent the San Antonio School Board, as it existed at that time, and the San Antonio Independent School Distract, from enforcing a rule requiring all school children to be vaccinated. That said suit proceeded to trial, and upon a hearing it was adjudged that the plaintiff did not have a right to attend school without compliance with said rule, and it was adjudged that said plaintiff was not entitled to attend the schools without being vaccinated. Said suit was appealed, and said judgment was affirmed, and became final. That later, in the year, 1917, A. D. Zucht, in behalf of the plaintiff, brought another suit in the 37th District Court, in Bexar County, Texas, for injunction, attempting to restrain the Board of Education and the San Antonio Independent School District from enforcing the said order and direction before set out, given to its teachers and superintendents of the schools. That on a hearing of said cause an injunction was refused, and it was adjudged and decreed that the plaintiff in that suit did not have the right to injunction, and that this plaintiff did not have the right to attend the school without a compliance with said ordinance. That pending the appeal of said suit it was agreed between the attorneys for the plaintiff in said suit and the attorneys for the San Antonio Independent School District, and the members of the Board of Education of San Antonio, and
30 with the plaintiffs in that suit, which were —— ——, —— Pardue, and A. D. Zucht, et al., that the said ordinance and rule would not be enforced as to this plaintiff, and the children mentioned in that suit, until the same had been passed on on appeal. That said case was finally passed on on appeal, and the holding of the lower Court sustained, on or about February 10th, 1919. That from the institution of the last named suit in 1917, until March, 1919, the plaintiff attended the schools without complying with said rule and ordinance.

(14) Defendants show that at all times when said ordinance and said rule had been declared enforceable, and the Courts had held against the plaintiff, she and her father were seeking to avoid a compliance therewith.

(15) Defendants show further that plaintiff and her father, A. D. Zucht, have boasted that this matter will be kept in the Courts for an indefinite time, so that the plaintiff may continue to attend the public schools in the City of Antonio until she shall have graduated from them, without ever complying with said vaccination ordinance, or any rule with respect to vaccination, regardless of conditions in San Antonio, and regardless of whether or not other school children were being compelled to comply with said ordinance and regulation.

(16) These defendants further show that plaintiff is not a resident of the San Antonio Independent School District, and is not

entitled to attend the public schools of said District, and has not been a resident of such District, nor entitled to attend the schools of said District for some time past.

(17) These defendants show that plaintiff has never made any complaint or appeal to the Superintendent of Public Instruction of Texas in regard to the alleged exclusion from the public schools of the San Antonio Independent School District.

(18) These defendants show that plaintiff's exclusion
31 from the public schools was on account of the acts, ordinances, resolutions, conditions and circumstances hereinbefore pleaded, and on account of instructions of the city health officer of the City of San Antonio being also ex-officio state health officer; that at all times these defendants have acted toward plaintiff with good faith and without any malice or intent to injure in the use and exercise of official discretion as public servants.

(19) Premises considered, defendants pray that they be permitted to go hence without day, and the plaintiff take nothing by this suit, and that all relief prayed for by plaintiff be denied, and they pray that they recover all costs of suit.

B. W. TEAGARDEN,
R. L. BALL,
Attys. for Above Named Defets.

Filing.

Filed Dec. 2, 1919.
OSCEOLA ARCHER,
Clerk of the District Courts,
Bexar County, Texas,
by JACK HORNER,
Deputy.

32 *Original Answer of Deft. W. A. King.*

In the District Court, 45th Judicial Dist., Bexar Co., Texas.

No. B-20453.

ROSALYN ZUCHT, by Next Friend, A. D. ZUCHT,

vs.

W. A. KING et al.

Original Answer of Deft. W. A. King.

Filed Apr. 7, 1919.

Now comes the defendant W. A. King in the above styled and numbered cause and excepts to plaintiff's petition and says that same is insufficient to show any cause of action against him, and of this demurrer prays judgment of the Court.

For further answer, if same be required, this defendant denies all and singular the allegations in plaintiff's petition contained, puts himself upon the Country & prays judgment.

R. J. McMILLAN,
J. D. DODSON,
Attys. for Deft. W. A. King.

Filing.

Filed Apr. 7, 1919.

OSCEOLA ARCHER,
Clerk of the District Courts,
Bexar County, Texas,
By GEO. W. HUNTRESS, JR.,
Deputy.

33 *Original Answer of Deft. Mrs. Dan Leary.*

In the District Court, 45th Judicial District, Bexar Co., Texas.

No. B-20453.

ROSALYN ZUCHT, by Next Friend, A. D. ZUCHT,

vs.

W. A. KING et al.

Original Answer of Deft. Mrs. Dan Leary.

Filed Jan. 29, 1920.

Now comes Mrs. Dan Leary (Mrs. Harriet N. Leary) and in answer to plaintiff's petition excepts to same generally & says that same is wholly insufficient to show any cause of action against her & of this prays judgment of the Court.

And for further answer if same be required, this defendant denies each & every allegation in plaintiff's petition.

B. W. TEAGARDEN,
Atty. for Deft. Mrs. Dan Leary.

Filing.

Filed Jan. 29, 1920.

OSCEOLA ARCHER,
Clerk of the District Courts,
Bexar County, Texas,
By GEO. W. HUNTRESS, JR.,
Deputy.

Plaintiff's First Supplemental Petition.

In District Court of Bexar County, 45th Judicial District of Texas.

No. B-20453.

ROSALYN ZUCHT, by Next Friend,

vs.

W. A. KING et al.

Plaintiff's First Supplemental Petition.

Filed Jun. 16, 1919.

Now comes plaintiff by her next friend, A. D. Zucht, and by leave of the court, files this first supplemental petition by way of reply to the second amended original answer of the defendants herein; and, for such reply, say- that:

1. Plaintiff excepts to the plea in abatement set forth in said answer because the same is utterly insufficient in law, and sets forth no legal ground for abating this suit.

34 2. Plaintiff specially excepts to so much of clause (2) of the special answer contained in said pleading as avers that the ordinance set forth in said clause in a valid ordinance because said averment states a mere conclusion and opinion of law.

3. Plaintiff excepts to so much of clause (3) of said special answer as avers that the resolution of the San Antonio School Board set forth in said clause was and is a valid, binding and lawful rule, because said averment states a conclusion and opinion of law.

4. Plaintiff excepts to clauses 4, 5, 6, 7, 8, 9, and 10 of said special answer because the facts alleged in said clauses, if true, constitute no defense to plaintiff's suit.

5. Plaintiff specially excepts to clause (9) of said special answer because the same undertakes to present an issue of fact that the courts cannot and will not undertake to determine.

6. Plaintiff specially excepts to clause (12) of said special answer because the facts alleged in said clause constitute no defense to plaintiff's suit.

7. Plaintiff excepts to clause (13) of said special answer because the same constitutes no defense whatever to plaintiff's suit.

8. Plaintiff specially excepts to so much of said clause (13) of said special answer as avers that A. D. Zucht, plaintiff's next friend, "has at all times avoided the rules and regulations of the said School Board," meaning the San Antonio School Board, because said aver-

ment is utterly immaterial to any issue in this cause, and even if true constitutes no defense to plaintiff's action.

No. 9. Plaintiff specially excepts to all that part of clause (13) of said special answer that undertakes to allege certain legal proceedings and judgments, and an agreement made pending one of the suits alleged in said clause, because all of said part of said clause is utterly immaterial and irrelevant to any issue in this cause,
35 and constitutes no defense to this action of plaintiff.

No. 10. Plaintiff specially excepts to so much of said clause (13) of said special answer as sets forth certain legal proceedings and judgments, because, if said part of said pleading is an undertaking to claim that the issues in this cause have already been finally adjudicated and determined by said legal proceedings and judgments against plaintiff the same is utterly insufficient as a matter of law.

No. 11. Plaintiff specially excepts to said part of said pleading setting forth certain legal proceedings and judgments because there are no sufficient allegations of facts showing that the parties to said legal proceedings and judgments were the same parties as the parties to this suit, nor is there any allegations as to what were the pleadings of the parties in said suits upon which the alleged judgments were based, nor is there any allegation of facts showing that the very issues in said legal proceedings were the identical issues involved in this suit, nor is there any allegation of facts showing that such issues, if they were identical with the issues in this suit, were finally determined and adjudicated in said legal proceedings.

No. 12. Plaintiff specially excepts to clause (14) of said special answer on the same grounds as those set forth in the immediately preceding exception, and also because the allegations of said clause present no defense to plaintiff's action.

No. 13. Plaintiff excepts to clause (15) of said special answer because the same presents no defense whatever to plaintiff's action, and the allegations of fact contained in said clause constitute what is generaly known as "buncombe."

Of all of which exceptions, plaintiff prays the judgment of the court.

DON A. BLISS,
Attorney for Plaintiff.

36 Should plaintiff be required to reply further to the answer of the defendants, then plaintiff denies all and singular the allegations contained in said answer, and puts herself upon the country.

DON A. BLISS,
Attorney for Plaintiff.

Filing.

Filed Jun. 16, 1919.

OSCEOLA ARCHER,
Clerk of the District Courts,
Bexar County, Texas,
By GEO. W. HUNTRESS, JR.,
Deputy.

Judgment.

In the 45th District Court, Bexar County, Texas.

No. B-20453.

ROSALYN ZUCHT, by Next Friend,

vs.

W. A. KING et al.

Judgment.

Ent. Vol. "21," Page 439.

On this 29th. of January A. D. 1920 at a regular term came on to be heard the above styled and numbered cause and coming plaintiff and defendants, other than Ray Lambert, in person and by attorneys and thereupon plaintiff stated in open court that it was desired to dismiss said suit as to defendant Ray Lambert who was not served and it is accordingly ordered & decreed that plaintiff suit be and is dismissed as to said defendant, Lambert; thereupon came on to be heard the general demurrers of all the remaining defendants and the special exceptions of plaintiff to the answers of the defendants & upon consideration of said general demurrers the court is of the opinion that they are well taken & should be sustained.

On consideration of plaintiff's special exceptions contained in plaintiff's first supplemental petition, the Court is of the opinion that they are not well taken and it is ordered that they be and are overruled.

The plaintiff then having declined to amend it is ordered & adjudged & decreed that this said suit be and the same is hereby dismissed and that the defendants go hence without day and recover all costs against A. D. Zucht next friend of plaintiff for which let execution issue.

Thereupon the plaintiff in open court excepted & gave notice of appeal from this order & decree to the Court of Civil Appeals for the 4th Supreme Judicial District of Texas.

Entry.

Ent. Vol. "21," Page 439.

Assignment of Errors.

In District Court of Bexar County, 45th Judicial District of Texas.

No. B-20453.

ROSALYN ZUCHT, by Next Friend,

vs.

W. A. KING et al.

Assignment of Errors.

Filed Feb. 16, 1920.

Now comes Rosalyn Zucht by her next friend, A. D. Zucht, plaintiff in the foregoing styled and numbered cause, and makes the following

Assignment of Error-.

1. The court erred in sustaining the general exception of the defendants in said cause to plaintiff's second amended original petition and in dismissing her suit.

2. The court erred in overruling special exception No. 1 made by plaintiff to the third amended original answer of the defendants Evans, Gerlach, McFarland, Beretta, McCamish, Guerra, Scholz and Johnson.

3. The court erred in overruling special exception No. 2 made by plaintiff to the said answer of said defendants.

4. The court erred in overruling special exception No. 3 made by plaintiff to said answer of said defendants.

5. The court erred in overruling special exception No. 4 made by plaintiff to said answer of said defendants.

6. The court erred in overruling special exception No. 5 made by plaintiff to said answer of said defendants.

38 7. The court erred in overruling special exception No. 6 made by plaintiff to said answer of said defendants.

8. The court erred in overruling special exception No. 7 made by plaintiff to said answer of said defendants.

9. The court erred in overruling special exception No. 8 made by plaintiff to said answer of said defendants.

10. The court erred in overruling special exception No. 9 made by plaintiff to said answer of said defendants.

11. The court erred in overruling special exception No. 10 made by plaintiff to said answer of said defendants.

DON A. BLISS,
Attorney for Plaintiff, Rosalyn Zucht,
Acting by Next Friend.

Filing.

Filed Feb. 16, 1920.
OSCEOLA ARCHER,
Clerk of the District Courts,
Bexar County, Texas.
By D. J. MARR,
Deputy.

Appeal Bond.

In District Court of Bexar County, 45th Judicial District of Texas.

No. B-20453.

ROSALYN ZUCHT, by Next Friend, A. D. Zucht,

vs.

W. A. KING et al.

Appeal Bond.

Filed Feb. 16, 1920.

Whereas on the 29th day of January, 1929, a judgment was rendered by the court in the foregoing styled and numbered cause sustaining the general exception of the defendants in said cause to the second amended original petition of the plaintiff in said cause and dismissing the suit of the plaintiff, which action of the court the plaintiff then and there excepted and in open court gave notice of appeal from said judgment to the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas; and

Whereas the said plaintiff desires to perfect said appeal; and the clerk of said court has fixed the probable amount of the costs of the suit in the Court of Civil Appeals, the Supreme Court and the court below at the sum of Three Hundred Dollars; Now, therefore, Know All Men By These Presents That we, Rosalyn Zucht, by her said Next Friend, A. D. Zucht, the plaintiff in said suit, Appellant, as principal and —— —— and —— ——, as sureties acknowledge ourselves bound to pay to W. A. King, E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. W. W. McCamish, Mrs. Henry Guerra, Mrs. Dan Leary, Paul Scholz, and Marshall Johnson, defendants in said suit, Appellees, the sum

of Six Hundred Dollars conditioned that the said Appellant shall prosecute said appeal with effect, and shall pay all the costs which have accrued in the court below and which may accrue in the Court of Civil Appeals and the Supreme Court.

Witness our hands this 16 day of February, 1920.

ROSALYN ZUCHT,
By A. D. ZUCHT,
Next Friend,
J. L. FELLER,
Principal.
W. M. PARDUE,
G. S. LINCOLN, M. D.,
Sureties.
JOSEPH BERMAN.

I have fixed the probable amount of costs in this Suit, in the Court of Civil Appeals, the Supreme Court and Court below at $300.00 and approve the above Bond this 16th. day of Feb. 1920.

OSCEOLA ARCHER,
Dist. Clk. Bexar Co., Texas,
By D. J. MARR,
Depty.

Filing.

Filed Feb. 16, 1920.

OSCEOLA ARCHER,
Clerk of the District Courts,
Bexar County, Texas,
By D. J. MARR,
Deputy.

40 District Court, 45th Judicial District, in and for Bexar County.

No. B-20453.

ROSALYN ZUCHT, by Next Friend, A. D. Zucht,

vs.

W. A. KING et al.

Bill of Costs.

Clerk's Fees.

Docketing	.20
Citations, Copies & Returns	15.00
Approving Bond	1.50
Docketing Motions	.15
Filing Papers	2.40
Entering Appearances	1.80
Entering Continuances	1.00
Entering Orders	5.25
Entering Judgments	1.00
Assessing Damages	.50
Precepts to Serve Copies	1.50
Commissions to Take Depositions	.75
Copies of Interrogatories	5.00
Subpœnas	.25
Additional Names	1.95
Taxing Costs	.25
Transcripts $21.50-$23.00	44.50
Total Clerk's Fees	$83.00

Sheriff's Fees.

Executing Citations	8.25
Executing Subpœnas	7.00
Jury Fee	.50
Mileage	3.45
Total Sheriff's Fees	$19.20

Recapitulation.

Clerk's Fees	83.00
Sheriff's Fees	19.20
Jury Fund	5.00
Stenographer's Fees	3.00
Deposition of Dr. J. W. Oxford	5.00
	$115.20
Total Amount Due	$115.00

41 *Certificate.*

THE STATE OF TEXAS,
County of Bexar:

I, Osceola Archer, Clerk of the District Courts of Bexar County, Texas, do hereby certify that the foregoing Forty-one (41) pages contain a true and correct transcript of all the orders and proceedings had in a cause on the Civil Docket of the District Court of the 45th Judicial District of Bexar County, Texas, numbered No. B-20453, wherein Rosalyn Zucht by Next Friend A. D. Zucht is Plaintiff and W. A. King, et al. is Defendant.

Witness my hand and seal of said court, at office in the city of San Antonio, Texas, this the 2nd., day of October, A. D., 1920.

OSCEOLA ARCHER,
District Clerk, Bexar County, Texas.
By D. J. MARR,
Deputy.

Endorsed: No. 6428. Rosalyn Zucht by Next Friend, Appellant, vs. W. A. King, et al., Appellees. From the District Court of Bexar County — Judicial District of Texas. Applied for by Don. A. Bliss, Attorney of record for Appellant, on the 16th day of Feby. 1920 and delivered to Don A. Bliss on the 2nd. day of Oct. 1920. Osceola Archer, Clerk, District Courts, Bexar County, By D. J. Marr, Deputy. Filed in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, by order Court as substitute transcript, the 6 day of Oct. 1920, Jos. Murray, Clerk.

42 *Opinion.*

No. 6428.

ROSALYN ZUCHT (by Next Friend), Appellant,

vs.

W. A. KING et al., Appellees.

Appeal from Bexar County.

Rosalyn Zucht, by A. D. Zucht, her next friend, brought this suit in the District Court of Bexar County for the 45th. Judicial District of Texas against W. A. King, Ray Lambert, E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. E. W. McCamish, Mrs. Henry Guerra, Mrs. Dan Leary, Paul Scholz, and Marshall Johnson, appellees in this cause, seeking to recover damages in the sum of Ten Thousand Dollars on account of their having unlawfully discriminated against her and having unlawfully expelled her from the Public Schools of the San Antonio Independent School District and for a writ of injunction restraining and prohibiting the said appellees from discriminating against her and restraining and

prohibiting the appellees and each of them from attempting to enforce or enforcing a certain ordinance of the City of San Antonio, which she claimed was void, and for a peremptory writ of mandamus compelling the appellees and each of them to admit her to attendance in and upon said public schools; and she also prayed for general relief.

The suit was dismissed as to Ray Lambert, who was never served with process. The other defendants in the cause, appellees herein, answered presenting a general exception to the petition of the said Rosalyn Zucht, and certain special exceptions; and pleaded general denial and special answers.

The court overruled all the exceptions of appellant and sustained the general demurrer or exception to the petition, to all of which rulings of the court the appellant duly excepted, and declining or refusing to further amend, the suit was dismissed, to which appellant excepted and has brought her case to this court for review.

43 It is set forth in the petition that San Antonio is an incorporated city of more than one hundred thousand inhabitants, having an independent school district, incorporated by a special act of the legislature, controlled by a special body of officers known as the San Antonio School Board.

It sets out at length the operation of a system of street cars and various modes of transportation, theatres, public shows, churches and other places of meeting and congregating, and manufacturing industries operated in said city where the various inhabitants thereof congregate and continuously meet and come in contact with each other, besides at the school houses. The petition in minute detail sets out all the public places where people meet, but not necessary to further describe.

It sets out also the various private schools and institutions of learning in the city where great numbers of children under the age of twenty one years attend.

It sets out some of the public powers of the city in respect to quarantine to prevent the spread of contagious diseases within its limits; to enforce vaccination and to establish pest houses and to regulate the establishment of private hospitals.

It avers the city has no power over the public free schools because the management is vested in the San Antonio Independent School District and the said San Antonio School Board by the special act of the Legislature incorporating said San Antonio Independent School District and San Antonio School Board and that no power is vested in said School District or said Board, by the Legislature, to vaccinate.

It is further averred that all persons between the ages of seven and twenty-one years have the right to attend the public free schools in said District and receive instruction therein and are entitled to all the benefits of the free school fund furnished by the State and the public derived from taxation in said district for free school purposes, and authorized to levy taxes for acquiring land and for the 44 construction of improvement thereupon, maintaining, operating and carrying on the schools.

That the grounds and buildings are well kept and are in a sanitary

condition. The school buildings provided with individual seats, upon which the pupils or other persons are seated separate and apart from each other.

It is alleged the city council has never attempted to enforce vaccination generally among the inhabitants, nor even among the children generally; but undertook to discriminate against pupils who attended the schools and educational institutions in said city and the persons connected with said schools and institutions, including the pupils attending the same and other persons connected therewith by adopting an ordinance enforcing vaccination.

The ordinance requires any person conducting any place or institution of education in the limits of the city of San Antonio, whenever so required, to furnish the City Board of Health a list by name of all teachers, pupils and employees and other persons connected therewith, duly certified by affidavit, showing time and place of vaccination or not of all such above named persons and pupils. Also provides the Board of Health may require such vaccination within such period of time and under such regulations as said Board may require.

A fine of not less than Ten Dollars or more than One Hundred Dollars may be imposed for such offense and each day, for offense, is deemed a separate offense, and upon failure to pay such person is subject to imprisonment.

It also requires parents and guardians having custody of minor children to be promptly and effectively vaccinated, with a penalty attached of not less than five dollars nor over one hundred dollars; for failure to pay fine, imprisonment any number of days, not exceeding thirty, in the discretion of the recorder.

Further, that there was no other ordinance ever passed by the city to enforce vaccination.

45 It is alleged the ordinances providing for the infliction of punishment by fine and imprisonment have never been enforced and are regarded as a "dead letter" though many pupils and others have continually attended schools without presenting certicates of vaccination, as required by the ordinances.

It is further alleged there is more danger of the contagion of small-pox spreading from the close personal contact of persons in the assemblages and in the places other than the schools and educational institutions in said city in the places named in the petition than there is danger from the contact of the pupils, teachers, employees and other persons in said schools and educational institutions, especially in the case of the small Mexican quarter in the city where the danger of the breaking out of the disease called small-pox is infinitely greater than in the said schools and educational institutions.

That said ordinance is in effect and can be enforced whether there is an epidemic of small-pox or not. That the School Board has not had any rule with reference to vaccination.

That appellant was of the age of 15 years, and had been attending the free schools during the months of January and February 1919, known as the Brackenridge High School in said Independent School District.

That she had never been vaccinated, nor is she or her parents willing for her to be vaccinated.

It is further alleged a large number of other pupils who had furnished no certificates of vaccination were attending said school and other free schools in said district during the time that she was attending school, and were permitted to continue to attend schools without having been vaccinated, and without having furnished certificates of vaccination after she was expelled from said school. She was never exposed to small-pox and the sanitary conditions in said locality where she resided were excellent. No crowding of houses close together where crowds gather and assemble on the streets or elsewhere in said locality.

46 That there was no epidemic of small-pox in the city at the time and had not been for more than ten years before, nor in said school that she was attending.

That notwithstanding the foregoing facts, on March 3rd 1919, the defendants conspired to expel her from school and each of them acting wantonly and maliciously refused to permit her to attend school or any longer attend any other public school in said city unless she will submit to vaccination which deprives her of the benefit of an education and her proportionate benefits of the public school fund provided by the constitution and laws of Texas.

That the defendants pretend to have acted in their official capacities, but the act of the Legislature delegated all legislative power to the City Commissioners (City Council) and no legislative powers or authority whatever were vested in said Board of Health, nor did the City Council have power to delegate legislative powers or authority to said Board of Health or anyone.

That many pupils and other persons were attending the schools she was attending who were not required to be vaccinated and so permitted to continue to attend after she was expelled and no pretense to enforce the ordinance against many others similarly situated attending before and since without being vaccinated or certificate of vaccination.

That the defendants and especially W. A. King notified the principal of said private school if he continued to permit the plaintiff and her brother, Arthur Zucht, to continue to attend said private school they would close the school and thereupon they were compelled to cease attending said private school.

That other schools and educational institutions with reference to small-pox were the same as those schools plaintiff was attending. That the defendants and each of them wantonly and maliciously discriminated against plaintiff because she would not submit to vaccination and unlawful reasons. That by reason of which she has

47 been humiliated and put to shame and her feelings have been injured and her standing in the community injured, and she has been damaged in the sum of Ten Thousand Dollars.

That said ordinance is unreasonable, deprives pupils and other persons, including plaintiff, of their rights and privileges without due course of the law of the land and in violation of Section 19 of Article

1 of the Constitution of the State of Texas and denies the equal protection of the laws in violation of the XIV Amendment of the Constitution of the United States and is therefore absolutely void.

Further void by leaving it to the arbitrary discretion of the said Board of Health to determine when and under what circumstances it is to be enforced, without providing any rule by which said Board of Health is to be guided in its action and without providing any safeguards against partiality and oppression and in violation of the XIV Amendment of the Constitution of the United States.

That the partial, discriminatory and oppressive manner in which said ordinance has been administered by the authorities charged with its administration and is still administered, is a denial, through its executive department, to plaintiff and others of the equal protection of the laws in violation of the XIV Amendment of the Constitution of the United States.

She prays for judgment against each of said defendants for her damages, and for injunction &c. and for mandamus compelling the defendants and each of them to admit plaintiff to the attendance in and upon the free schools.

All the exceptions of appellant to defendants' answer were also overruled and error assigned on such rulings.

For the convenience of discussion, we will group appellant's first assignment and all propositions in which error is claimed. There is only one assignment against the action of the court dis-
48 missing case and that is in the most general terms; that the court erred in sustaining defendant's general exception and dismissing the case.

Under this general assignment, there are seven separate propositions challenging the ruling of the court, in effect, as follows: (*a*) The power conferred upon the city does not confer the power to discriminate in the enforcement of vaccination. (*b*) While the city had the right to classify its citizens with reference to vaccination and what circumstances and times should be enforced, it must be reasonable, and not arbitrarily enforced or arbitrarily exercised. (*c*) The ordinance leaves to the arbitrary discretion of the Board of Health to determine whether it is necessary in its opinion that all the teachers, pupils, employees or other persons connected therewith be vaccinated and therefore is void because it lays down no rules by which its impartial execution can be secured or partiality and oppression can be prevented. (*d*) Void because it undertakes to delegate its Legislative power to the City Council or Board of Commissioners to the Board of Health. (*e*) The ordinance undertakes to enforce vaccination against only children attending schools in said city and the persons connected with such schools laying burdens upon them not laid upon other children and other persons in like condition, and is therefore void under Article XIV of the Constitution of the United States as amended. (*f*) The ordinance as administered makes an unjust and illegal discrimination between the said Rosalyn Zucht and other pupils in the schools of said city in similar circumstances, is a denial of equal justice in expelling her from said schools because not vaccinated while permitting other

pupils under precisely like circumstances to continue said schools without being vaccinated is within the prohibition of the XIV Amendment of the Constitution of the U. S. depriving her of the equal protection of the laws. (*g*) The ordinance being void plaintiff has the right to issuance of a peremptory writ of mandamus with a writ of injunction as prayed. (*h*) Appellant having been wantonly and maliciously expelled from the public free schools, appellee and each of them are liable in damages to appellant.

There is nothing known to the law broader than the long arm of police power to protect the inhabitants of a city in its health and consequently against the ravages of disease. The power to eliminate disease of every kind that jeopardizes the health of her citizens and keep a clean, sanitary and healthy city is paramount to almost all other consideration, for "Cleanliness is next to Godliness." Much has been written and much has been said on the subject, and laws passed having an eye to the protection of health have met the approval of courts of all jurisdictions.

Twice before, the power of the school authorities has been attacked and the authority sustained by this court in Zucht vs. San Antonio School Board, 170 S. W. 840; Staffel et al. vs. San Antonio School Board, 201 S. W. 415, and it would appear settle the question against appellant. Appellant comes squarely now again with an attack on the validity of the same ordinances and the authority of the same Board; says she "never has been vaccinated, nor is she willing to be vaccinated, nor are her parents willing, because she and her parents fear that vaccination will endanger her health."

It does not appear anywhere in the petition why there should be any apprehension in regard to her health or why any exception should be made in her favor or why it would injure her, or affect her differently from others in any way that is not common to all others similarly situated and that question must therefore be stripped of all such considerations in this case, except the one of power.

We have carefully read each of the authorities cited by appellant to support her position, and do not believe they support her. The cited authorities are too numerous to discuss separately. But we will discuss the principles contended for in them as we give our views on the questions raised from time to time.

There is no greater authority or responsibility placed upon a city than to establish rules and regulations to protect the health and morals of a city. This power did not suddenly come up, but it followed the growth of civilization in the wake of necessity, progress and science, and spread of disease, and as conditions arose and necessity demanded, the inherent power to grapple with it sprang into life and action to the end that the blighting hand of disease might not touch and destroy the inhabitants. Hanzal v. City of San Antonio (Tex. Civ. App.), 211 S. W. 237.

In the very first case cited by appellant of City of Austin vs. Cemetery Association, 87 Texas, p. 336, it holds as a matter of course, that an injunction will lie to restrain the enforcement of a void ordinance. That doctrine is not denied by appellee. It is also here held to be in the power of the Legislature to make arbitrary

laws. While the court at that time hesitated to say the powers cannot be delegated to a municipal corporation, now no longer a controverted question, but in effect, says, where the charter power is sufficient to manifest such purpose and the same is not unreasonable, it will be upheld. Such ordinance is not void on its face. Whether the facts relied on to show the ordinance unreasonable are apparent in the face of the petition or not, a demurrer admits them as true, and the reasonableness or unreasonableness becomes a question of law for the court.

Appellant cites and relies upon, to support his contention, Yick Wo vs. Hopkins, 118 U. S. 356, 30 Law ed. 220. This we do not believe to be in support of the contention. It challenges an act in respect to engaging in a laundry business, conferring a naked, arbitrary power upon the board to give or withhold consent, and makes all engaged in the business the tenants at will as to their means of living, under the board of Supervisors. In other words, this ordinance obviously was directed at certain Chinamen who engaged in the laundry business, without having first obtained the consent of the Board of Supervisors, "except the same be
51 located in a building constructed either of brick or stone."

In this case there was an obvious purpose to confer the power to arbitrarily withhold consent without reason and without responsibility, not confided to discretion, but granted to their will, so arbitrary as to acknowledge neither guidance nor restraint. The court is there discussing a situation growing out of the arbitrary power imposing an unreasonable limitation upon the right of an individual to pursue or not an occupation at the mere will of another. As said by the learned Justice: "intolerable in any country where freedom prevails, as being the essence of slavery."

We agree with the North Carolina court, in State of North Carolina vs. Tennant, 15 L. R. A. p. 423, cited by appellant, prohibiting any building without permission of the aldermen in a city as void because it would make the right depend upon their arbitrary decision, subject to no uniform rule of action in respect to giving permits for various kinds of buildings—one to one class and another to another favorite. We do not think this supports appellant's contention.

We are here dealing with the power to enforce an ordinance for the protection of society dealing with a class in which the ordinance on its face does not discriminate or contemplate a discrimination.

There is a very broad distinction between an ordinance requiring children attending schools to be vaccinated from an ordinance general in its scope requiring barbers to be vaccinated. This is one of appellant's favorite illustrations. In the former case the children are the wards of the city, to whom the parent for the time being, in a limited sense, entrust them. Coming from various sections and kept together in close school rooms, and a different principle arises. It might as well be contended that the school board could not enforce a rule against an unmanageable, unruly and immoral pupil, whose conduct and undisciplined nature make him antagonistic to
52 the unwritten rules of the school and insubordinate to such an extent as to demoralize the students. This is a mere illus-

tration, for there is no complaint against appellant that she is not one of the very best and most studious. The complaint is that she and her parents put themselves in opposition to a requirement regarded necessary for the protection of the health of the community. It was never contemplated in cases such as the latter (barbers) that police power should go so far and it does not meet the question that any one engaged in a business enterprise should first do certain unnecessary things, unless it was such a regulation thereon as to promote the general health, prevent the spread of disease and for the good of society. No one could or would contend, before a person entered a barber shop to be shaved he should be vaccinated, the same with reference to a theatre or a church or a crowded store. We are discussing a police regulation affecting the schools, school children, for their good and the good of society against the possible spread of one of the most filthy and dangerous diseases. We are not dealing with abstract questions such as appellant contends for, "that there is more danger of contracting small-pox and spreading the contagion in the other places named than there is in the public schools"; but with the vital question of the protection of health and the spread of a loathsome disease. The question of the spread of disease in other places generally is not before us, but if it were, we can conceive of no greater spread of the terrible disease than through the public schools. Here the children come from every remote home throughout the city, that of the humble as well as the rich, seeking the benefits of education. They are thrown in contact with each other every school day during the scholastic term, and each child so coming in contact with a diseased child may take it home and so on it goes. Vaccination is for the good of the child as well as for society.

If the complained of ordinance is directed at school children and attendants, composed of children whose resistance against
53 disease and tender years prevent them from taking proper care against the ravages of small pox, constitutes a special class, dealing with all similarly situated as a protective health measure, it does not violate any principle of law, for such classification has a reasonable, if not a commendable basis, and has been sustained time and again. Zucht vs. San Antonio School Board, 170 S. W. 841; City of New Braunfels v. Waldschmidt, 207 S. W. p. 303; Staffel et al. vs. S. A. School Board, 201 S. W. 414; Herbert vs. Demopolis, School Board of Education, 73 Southern Rep. 321; Viemeister vs. White, 22 N. E. 97; Bissel v. Davison, et al. Book 29 L. R. A. 251; State vs. Zimmerman, 58 L. R. A. 78-81; State vs. Martin, 204 S. W. 622-3; State vs. Board of Education, 81 N. E. 568; Abul vs. Clark, 24 Pac. 383-4; Greene vs. City of San Antonio, 178 S. W. 6-9; 6 R. C. L. p. 394; McSween vs. School Trustees, 129 S. W. 206-8; Jacobson vs. Massachusetts, 197 U. S. 22-27.

If the city under its broad powers to "enforce vaccination," the test of such power be that it could be only enforced during a time of epidemic, after many had been consigned to the grave for the want of it, it would indeed be a farce. But the test is, is it a reason-

able regulation such as can be enforced as a preventative at all times in advance of an epidemic.

When we reach the conclusion, as we do, that these ordinances were enacted in pursuance of a grant of wise and valid power, which the Legislature expressly delegated to the City Council through its charter, "to enforce vaccination," we pronounce its validity without reference to the actual existence of small-pox or not, though appellant concedes it exists among certain Mexicans all the time. We regard it as a reasonable preventative, not open to our inquiry as to its reasonableness any more than you can inquire into the reasonableness of the act of the Legislature. They are reasonable
54 in view of the ever present menace to health. We cannot shut our eyes to the location of this city, where the means of communication to certain localities and where appellant concedes the existence of small pox all the time in certain quarters where the disease is ever present and liable to quickly spread through our schools like wild fire upon the prairies, feeding upon our young and tender school children away from the ever tender and observant eye of the parent, and then throughout the homes in the city, must thereby concede a necessity. We can say same such motive may have persuaded the law making power, in such wholesome legislation. No court would be justified in setting aside such an ordinance either as being unreasonable or for want of necessity, for it is a measure clearly for the protection of health and to prevent the spread of a noxious malady and ofttimes very fatal, and in no wise is it an exercise of arbitrary power. The Board of Health is the public agency through which the City Council acts to determine the necessity arising to put the ordinance in effect as to its provisions and that is no delegation of legislative power. It lays down the event in which the necessity to the public health requires the action and is valid. It is a valid exercise of power. That there are over violations of the act by the officers whose duty it is to enforce them can not be regarded as a reason to declare the law invalid. Its validity is a shield to those acting within its scope. If officers charged with a public duty were not protected in its enforcement from damages by those who openly defied it, and in turn through anger or resentment seek to subject those charged with its administration to heavy penalties, it would indeed be difficult to secure substantial persons, financially responsible, willing at such a hazard to serve the public.

The welfare and the happiness of the many is far superior to those few who decline and resist its enforcement, and the alleged fear of endangering appellant's health must be regarded as entirely immaterial. City of New Braunfels vs. Waldschmidt, 207 S. W. (Sup.) 303-305; Jacobson vs. Massachusetts, 197 U. S. 11; State vs. Hav. 49 L. R. (N. C.) 589.

55 Appellant concedes "Society is justified in imprisoning those afflicted with small-pox" and those exposed, then denies that the State has the same right to enforce it against the individual in order "to protect society against the ravages of small-pox" that might ensue if not properly protected against.

Appellant asserts the "Appellate courts have almost invariably dodged the question." This we deny, as shown by the cases cited. When appellant made that statement, we must assume, in his diligent search for authority, he overlooked the more recent decisions upon the subject. In Hanzal vs. City of San Antonio, cited above, the Chief Justice of this court, in his usual strong, vigorous and finished language, discussing the powers of the city, in such cases, passed upon every question raised here and exhausted the broad subject so completely that there is nothing left to be said upon the subject, and certainly nothing can be added to his reasoning.

We hold that the ordinance is valid; not unreasonable on the claimed ground that it operates without reference to the actual existence of a small-pox epidemic in the city; that there is no unlawful discrimination against persons attending schools and it is not unreasonable and arbitrary in view of the conditions in the Mexican quarter of the city and the crowding together of people in street cars, jitneys, theatres, churches, passenger depots, factories, laundries, parks, &c. Nor does it deny appellant or any pupil rights and privileges without due course of the law of the land. That other pupils not vaccinated are permitted to attend school under similar circumstances, if true, would only show the officers were not performing a public duty, but cannot affect the validity of the law.

There could be committed to the board no other than an
56 arbitrary discretion to enforce this law to all alike. It nowhere in its terms permits a discrimination allowing the Board to say which student or person attending shall be vaccinated or not. There is nothing in the ordinance that can bear such construction. This ordinance delegates no legislative power whatever to the Board, but only the power to carry it into effect, to see that it is executed. It is not a function of legislative power to determine the necessity of vaccination and the enforcement of its provisions through proper regulation.

Having determined the validity of such ordinances, we must likewise hold that no cause of action is presented against the defendants, or any of them. This law stands as a shield to protect them from damages in performing a lawful act. The appellant has no peculiar right or property right to attend a public school or private school different from others similarly situated in defiance of the rules so established for the protection of the school children themselves, and for society in general, without meeting the prescribed regulation for vaccination.

Because of appellant's earnest insistence in her contention, and because the case was determined on a demurrer, dismissing the case, we have taken unusual pains to set out all of appellant's contentions so vigorously urged. Both sides have cited numerous authorities, which we have read and considered. We have examined all the assignments urged and presented, and those directed at the ruling of the court on appellant's exceptions to appellees' answer; but they have ceased to be important since we have found no error in the ruling of the court below in sustaining the appellees' exception.

The judgment of the court is affirmed.

T. D. COBBS,
Associate Justice.

Opinion delivered and filed October 20, 1920.

Endorsed: No. 6428. In Court of Civil Appeals Fourth Supreme Judicial District of Texas, San Antonio. Rosalyn Zucht (by Next Friend) Appellant, vs. W. A. King et al., Appellees. From Bexar County. Opinion by Hon. T. D. Cobbs, Associate Justice. Affirmed. Filed in the Court of Civil Appeals at San Antonio, Texas, Oct. 20, 1920, Jos. Murray, Clerk. Filed in Supreme Court Dec. 30, 1920, F. T. Connerly, Clerk.

57 *Judgment of the Court of Civil Appeals.*

Wednesday, October 20th, A. D. 1920.

No. 6428.

ROSALYN ZUCHT (by Next Friend), Appellant,
vs.
W. A. KING et al., Appellees.

Appeal from District Court (45th Dist.), Bexar County.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that appellant, Rosalyn Zucht, by A. D. Zucht next friend, and sureties, J. L. Feller, W. M. Pardue, G. S. Lincoln, M. D. and Joseph Burman, pay all costs in this behalf expended and incurred, and this decision be certified below for observance.

Appellant's Motion for Rehearing.

In Court of Civil Appeals, Fourth Supreme Judicial District of Texas, San Antonio.

No. 6428.

ROSALYN ZUCHT, by Next Friend, Appellant,
vs.
W. A. KING et al., Appellees.

Appellant's Motion for Rehearing.

58 Now comes Rosalyn Zucht, by her next friend, A. D. Zucht, appellant in the foregoing styled and numbered cause and moves the Court to grant her a rehearing in said cause,

and, upon such rehearing to set aside the judgment of this Court affirming the judgment of the trial Court and to reverse the judgment of the trial Court and remand the cause for a trial upon its merits for the following reasons, to-wit:

1. The Court erred in stating in its opinion that appellant concedes that smallpox exists among certain Mexicans all the time, for the reason that appellant has made no such concession; but, on the contrary, alleges in her petition that there was no smallpox at all in the City of San Antonio, which is the Independent School District, at the time she was expelled from the public schools.

2. The Court misapprehended the position of appellant in that clause of its opinion marked (*d*) wherein the Court states that appellant contends that the ordinance is "void because it undertakes to delegate its legislative power to the City Council or Board of Commissioners to the Board of Health," because the position of appellant, as shown by her brief in this cause, is that the ordinance is void, among other reasons, for the reason that the City Council, by the terms of said ordinance, undertakes to delegate to the City Board of Health, the legislative authority of the City Council; in other words, that the City Council itself, having delegated authority to legislate for the enforcement of vaccination, could not and cannot subdelegate its legislative authority to the City Board of Health.

3. The Court misapprehends the allegations of appellant with reference to the capacities in which the appellees acted, which allegations are contained in paragraph 20 of her petition, in which, facts are set forth showing that appellees have used their official capacities as a mere cloak to cover acts of personal malice
59 - toward her and her brother, and the delegation of legislative authority is not referred to in connection with said facts; yet the Court, in undertaking to state the substance of appellant's petition, make it appear that appellant alleged "that the defendants pretended to have acted in their official capacities, but the act of the Legislature delegated all legislative power to the City Commissioners," etc.

4. The Court erred in that the Court misapprehends the position of appellant and has therefore misstated the position of appellant in stating that appellant asserts that "the Appellate Courts have almost invariably dodged the question" involved in this case, because the statement in the argument of appellant in her brief is that the Appellate Courts have almost invariably dodged the question as to the power of the Legislature to enact a compulsory vaccination law, a question that possibly may be held not to be involved in this case.

5. The Court erred in holding that the same questions involved in this case with reference to the validity of the ordinance involved in this case were decided by the decisions of this Court in Zucht vs. San Antonio School Board, 170 S. W. 840 and Staffel vs. San

Antonio School Board, 201 S. W. 413, because, though the appellant in the case of Zucht vs. San Antonio School Board urged that the said ordinance involved in this case was void, this Court expressly refused to pass on the question, holding that the question of the validity of the ordinance was not involved in the case; and in Staffel vs. San Antonio School Board, the question of the validity of the ordinance in question in this case does not appear to have been involved at all and was most certainly not decided by the Court; and while it is true that a rule adopted by the San Antonio School Board requiring all children attending the February terms of the public schools should have certificates of successful vaccination was attacked, yet this Court upheld the rule on the ground that the verdict of the jury showed that, at the time, the conditions with reference to smallpox existing in the City of San Antonio
60 constituted a menace to the public health; and this Court expressly held that the rule adopted by the San Antonio School Board meant that it should be enforced only when such an emergency existed and was not intended to be a permanent rule to be enforced regardless of whether there was a single case of smallpox in the State or not, though the appellant in that case contended that it was and was intended to be a permanent rule regardless of whether there was a single case of smallpox in the State or not.

6. The Court erred in holding that merely because the Legislature has the power to pass an unreasonable law, a municipality has the power to adopt an unreasonable ordinance.

7. The Court erred in not sustaining appellant's first assignment of error as set forth in her printed brief.

8. The Court erred in holding that, under the power given to the City of San Antonio by its Charter to enforce vaccination, the City Council of said City had and has the authority to adopt and enforce an ordinance with reference to vaccination discriminating against those attending and connected with the schools and educational institutions in said City; placing burdens upon those attending such schools and educational institutions and connected therewith that are not placed upon other persons under like conditions and circumstances.

9. The Court erred in not holding that, the ordinance in putting those who attended the schools and other educational institutions in said City and those connected therewith in a class against whom vaccination should be enforced and leaving the other persons in said City free from such a burden though in precisely the same conditions and under precisely the same circumstances as the persons attending such schools and educational institutions and persons connected therewith, does not make an unreasonable classification.

10. The Court erred in not holding that the ordinance of the City of San Antonio involved in this cause is void because it leaves
61 it to the arbitrary discretion of the City Board of Health to determine whether it is necessary for the public health of any

place or institution of education in said City that all the teachers, pupils, employes or other persons connected therewith, be vaccinated, and undertakes to clothe said Board with power to require such vaccination within such period of time and under such regulations as such Board of Health may require, laying down no rule by which the impartial execution of the power vested in said Board can be secured or partiality and oppression can be prevented.

11. The Court erred in not holding that said ordinance is void because it undertakes to delegate the Legislative power of the City Council, or Board of Commissioners of said City, to the City Board of Health.

12. The Court erred in holding that said ordinance does not violate the XIV Amendment to the Constitution of the United States in that said ordinance undertakes to enforce vaccination against the children attending the schools in said City and the persons connected with such schools only, thereby discriminating against the persons attending educational institutions and the persons connected therewith and laying burdens upon them not laid upon other persons in like conditions and under like circumstances.

13. The Court erred in not holding that the action of the appellees' functioning as officials of said City and of the San Antonio Independent School District, in making an unjust and illegal discrimination against appellant and her brother in expelling her and her brother from the public schools and in causing her and her brother to be dismissed from a private school in said City because they would not submit to vaccination, while they knowingly permitted great numbers of other pupils attending said public schools who were in precisely the same condition and were under precisely the same circumstances as she and her said brother, to continue attending said schools without being vaccinated and without having any vaccination certificates and while appellees did not even pretend to enforce said ordinance against anyone else attending the
62 private schools, was not an act of the State, through its Executive Department, depriving appellant and her said brother of the equal protection of the laws, in violation of the XIV Amendment to the Constitution of the United States.

14. The Court erred in holding that the XIV Amendment to the Constitution of the United States does not protect individuals, including appellant, against the administering of said ordinance with an evil eye and an unequal hand against appellant and her said brother by enforcing said ordinance against appellant and her said brother and knowingly and willfully and systematically allowing other persons in precisely the same condition and under precisely the same circumstances to be free from the enforcement of said ordinance.

15. The Court erred in holding that said ordinance is not unreasonable because the ordinance shows on its face that vaccination is to be enforced against all persons attending schools and educational in-

stitutions in the City of San Antonio and the persons connected therewith regardless of whether there is a single case of smallpox in the State or in the United States or in any other Country, and said ordinance shows on its face further that it is left to the arbitrary discretion of the Board of Health of said City to determine when vaccination shall be enforced against the persons attending any particular school or educational institution in said City and against the persons connected therewith without prescribing under what circumstances and conditions vaccination shall be enforced as to such particular school or educational institution and without any provision guarding against partiality, discrimination and oppression.

16. The Court erred in holding that the reasonableness of said ordinance is not open to inquiry by the Courts.

17. The Court erred in holding that said ordinance lays down the rule by which the City Board of Health is to be guided in determining whether or not vaccination shall be enforced against the persons attending or connected with any particular school or
63 educational institution.

18. The Court erred in holding that said ordinance delegated no legislative power whatever to the City Board of Health but only gave to the City Board of Health the power to carry the ordinance into effect and to see that it is executed.

19. The Court erred in holding that the power to determine the necessity of vaccination and to determine when, where and under what circumstances and against what persons vaccination shall be enforced is not a legislative power.

20. The Court erred in not holding said ordinance void because said ordinance shows on its face that it undertakes to enforce compulsory vaccination.

21. The Court erred in not sustaining appellant's first assignment of error as set forth in her brief.

22. The Court erred in not deciding the issue of law presented by appellant's second assignment of error as set forth in her brief because Article 1639 of the Revised Statutes makes it the duty of this Court to do so.

23. The Court erred in not deciding the issue of law presented by appellant's third assignment of error as set forth in her brief because said Article of the Revised Statute- plainly makes it the duty of this Court to do so.

24. The Court erred in not deciding the issue of law presented by appellant's fourth assignment of error as set forth in her brief because said Article of the Revised Statute- plainly makes it the duty of this Court to do so.

25. The Court erred in not deciding the issue of law presented by appellant's fifth assignment of error as set forth in her brief for the reason that said Statute- make it the plain duty of this Court to do so.

26. The Court erred in not deciding the issue of law presented by appellant's sixth assignment of error as set forth in her brief
64 for the reason that said Statute- makes it the plain duty of this Court to do so.

27. The Court erred in not deciding the issue of law presented by appellant's seventh assignment of error as set forth in her brief for the reason that said Statute makes it the plain duty of this Court to do so.

28. The Court erred in not deciding the issue of law presented by appellant's eighth assignment of error as set forth in her brief for the reason that said Statute makes it the plain duty of this Court to do so.

29. The Court erred in not deciding the issue of law presented by appellant's ninth assignment of error as set forth in her brief for the reason that said Statute makes it the plain duty of this Court to do so.

30. The Court erred in not deciding the issue of law presented by appellant's tenth assignment of error as set forth in her brief for the reason that said Article 1639 of the Revised Statutes makes it the plain duty of this Court to do so.

Respectfully Submitted,

DON A. BLISS,
Attorney for Appellant.

Endorsed: No. 6428 (Mo. 7751). Rosalyn Zucht, by Next Friend, Appellant, vs. W. A. King, et al., Appellees. Appellant's Motion for Rehearing. Filed in the Court of Civil Appeals at San Antonio, Texas, Nov. 3, 1920. Jos. Murray, Clerk. Overruled 11/17/20. Filed in Supreme Court Dec. 30, 1920. F. T. Connerly, Clerk.

Opinion on Motion for Rehearing.

No. 6428.

ROSALYN ZUCHT, by Next Friend, Appellant,

vs.

W. A. KING et al., Appellees.

Appeal from Bexar County.

On Motion for Rehearing.

65 Appellant complains of the statement in the opinion wherein we referred to the fact that appellant conceded the existence of small-pox in certain localities. We doubt very much whether any one can read certain parts of the petition and appellees' statement of the same facts in the answer and the statements, propositions and replied in appellant's brief to that effect, and

reach any other conclusion. Since appellant protests so vigorously, we "let it go at that," and say that such admission, contention or denial has nothing to do with the result of this case, and for that reason we may eliminate the denied concession.

It is contended we did not decide the law as presented by appellant's second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth assignments of error as we are required to do under Art. 1639 R. S. It is apparent to every one, when it is understood, as this case was dismissed on a general demurrer we had to decide every legal question properly pleaded.

Only one assignment was urged and that attacked the ruling of the court in dismissing the case and under that appellant urged seven separate propositions, embraced in from 3 to 24 pages, inclusive, of his brief. We discussed this assignment and every proposition thereunder. We devoted seven pages unnecessarily in stating her pleading and contention, thereby hoping to satisfy appellant's counsel that the case was fully stated and his position considered and discussed.

Now he complains that we did not make a separate discussion in respect to the remaining assignments. These were directed entirely at defendants' pleading, which could only become material in case we reversed the case. They could in no way affect the decision of this case. Worcester vs. Ry. 91 S. W. 339; El Campo Ice, Light & Water Company vs. Texas Machinery & Supply Co., 147 S. W. 338.

66 Appellant has doubtless overlooked the statement in the last paragraph of the opinion. We considered each one of those assignments. They were each without merit, and to sustain them would have been to reverse the case, and not required to be discussed unless the case had been reversed. The insistence for us to write on each when the opinion itself does so in general terms, would be "requiring us to do a useless thing", which the law never imposes.

There is nothing new presented in this motion and it is without merit, and the same is overruled.

T. D. COBBS,
Associate Justice.

Opinion delivered and filed Nov. 17, 1920.

Endorsed: No. 6428. In Court of Civil Appeals Fourth Supreme Judicial District of Texas San Antonio. Rosalyn Zucht, by Next Friend, Appellant, vs. W. A. King et al., Appellees. From Bexar County. Opinion on Motion for Rehearing by T. D. Cobbs, Associate Justice. Overruled. Filed in the Court of Civil Appeals at San Antonio, Texas, Nov. 17, 1920, Jos. Murray, Clerk. Filed in Supreme Court Dec. 30, 1920, F. T. Connerly, Clerk.

Order of Court on Motion for Rehearing.

Wednesday, November 17th, A. D. 1920.

No. 6428.

ROSALYN ZUCHT, Appellant,

vs.

W. A. KING, et al., Appellees.

Appeal from Bexar.

The motion of appellant for rehearing, filed Novr. 3rd., 1920, coming on to be heard, it is ordered by the court that said motion be and is hereby overruled; that appellant, Rosalyn Zucht, by her next friend A. D. Zucht, and sureties, J. L. Feller, W. M. Pardue, G. S. Lincoln, M. D. and Joseph Burman, pay all costs of this motion.

67 *Application for a Writ of Error.*

In the Supreme Court of the State of Texas.

ROSALYN ZUCHT, by Next Friend, Plaintiff in Error,

vs.

W. A. KING, et al., Defendants in Error.

Application by Rosalyn Zucht, by Next Friend, for a Writ of Error.

To the Honorable Supreme Court of the State of Texas:

Rosalyn Zucht, by her next friend, A. D. Zucht, hereby applies to the Court for a writ of error to the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas in the cause styled in said Court of Civil Appeals, Rosalyn Zucht, by Next Friend, Appellant, vs. W. A. King, et al. Appellees, said cause being numbered 6428 on the docket of said Court of Civil Appeals. Plaintiff in error invokes the jurisdiction of the Supreme Court of the State under clause 6 of Article 1521 of the Revised Statutes; and plaintiff in error also contends that the word "Statutes" used in Section 3 of said Article 1521, includes ordinances of a municipality, and since she attacks the validity of an ordinance of the City of San Antonio, she also invokes the jurisdiction of the Supreme Court of the State under said Section 3 of said Article.

Your applicant *respectively* shows to the Court that:

Statement of the Case.

In said cause of Rosalyn Zucht, by next Friend, Appellant, vs. W. A. King, et al., Appellees, which was in said Court of Civil Appeals on an appeal from a judgment of the District Court of Bexar County for the 45th Judicial District of Texas sustaining a general demurrer or exception of defendants in error to the Second Amended Original Petition of the said Rosalyn Zucht by her said next friend in said trial court and dismissing the suit of the said Rosalyn Zucht by her said next friend against W. A. King, et al., defendants in said trial court, the following questions were decided by said Court of Civil Appeals, as follows:

Questions Decided by the Court of Civil Appeals.

First question. Does the power and authority to enforce
68 vaccination conferred upon the City of San Antonio by the special charter granted to said City by the act of the Legislature give power to the City Council of said City to enact an ordinance requiring inhabitants of said City to be vaccinated regardless of whether or not there is a single case of smallpox in the State? The Court of Civil Appeals in said cause, decided this question in the affirmative.

Second question. Is the ordinance enacted by the City Council of the City of San Antonio requiring inhabitants of said City to be vaccinated regardless of whether or not there is a single case of smallpox in the State a reasonable ordinance? The Court of Civil Appeals in said cause, decided this question in the affirmative.

Third question. Does the mere fact that the said special charter of said City confers upon said City power to enforce vaccination deprive the Courts of power to enquire into and determine whether or not an ordinance enacted by the City Council of said City to enforce vaccination is reasonable?

The Court of Civil Appeals, in said cause, decided this question in the affirmative.

Fourth question. Does the said ordinance of the said City of San Antonio requiring inhabitants of said City to be vaccinated regardless of whether or not there is a single case of smallpox within the limits of the State of Texas volate Section 9 of Article I of the Constitution of said State protecting the people of said State in their persons from all unreasonable seizures and searches?

The said Court of Civil Appeals, in said cause, decided this question in the negative.

Fifth question. Does the general power and authority conferred by the Special Charter granted to the City of San Antonio by the act of the Legislature of the State to enforce vaccination confer
69 any power or authority upon the City Council of said City to discriminate by ordinance in such manner as to enforce vac-

cination against certain inhabitants of said City and leaving other inhabitants of said City in like circumstances and under like conditions free from the enforcement of vaccination?

The Court of Civil Appeals decided this question in the affirmative.

Sixth question. If the said power conferred upon said City by said charter gives power to its City Council to classify the inhabitants of said City wtih reference to vaccination by ordinance and to require by such ordinance that all the pupils attending the schools in said City and all the persons connected with such schools to be vaccinated, but requiring no other persons in said City to be vaccinated no matter what may be the circumstances or conditions, then is such classification so made by such ordinance a reasonable classification?

The said Court of Civil Appeals, in said cause, decided this question in the affirmative.

Seventh question. In requiring all the persons attending the schools and other institutions of education and all the persons connected with such schools and institutions of education in said City to be vaccinated but requiring no other persons in said City to be vaccinated though the circumstances surrounding such other persons not required to be vaccinated and the conditions with reference to smallpox are precisely the same, and even worse, and in subjecting the parents, guardians or other persons having the care, custody or control of such pupils to fine and imprisonment in case of failure or refusal to have such pupils vaccinated but not subjecting other persons under like conditions and circumstances to such punishments, does not said ordinance of said City violate the XIV Amendment to the Constitution of the United States by denying to certain inhabitants of said City the equal protection of the laws?

The said Court of Civil Appeals, in said cause, decided this question in the negative.

70 Eighth question. Said ordinance of said City, by its terms, providing that "Whenever, in the opinion of the Board of Health (of said City) it is necessary for the public health, or the health of any such place or institution set forth in Section I of the ordinance that all such teachers, pupils, employes and other persons connected therewith be vaccinated, said Board may require such vaccination within such period of time and under such regulations as said Board may require," is not this a delegation by the City Council of said City of its legislative authority to the said City Board of Health?

The said Court of Civil Appeals, in said cause, decided this question in the negative.

Ninth question. Since said ordinance of said City undertakes to leave it to the arbitrary discretion of the Board of Health of said City to determine whether it is necessary in the opinion of said Board of Health for the public health or for the health of any place or

institution of education in said City that all the teachers, pupils, employes or other persons connected therewith be vaccinated, and undertakes to clothe said Board with power to require such vaccination within such period of time and under such regulations as said Board may require, laying down no rules by which the impartial execution of said ordinance may be secured or partiality and oppression in its execution can be prevented, does not this render said ordinance void?

The said Court of Civil Appeals, in said cause, decided this question in the negative.

Tenth question. Does not said ordinance of said City, by leaving it to the arbitrary discretion of the said Board of Health of said City to determine when and under what circumstances vaccination shall be enforced as to any place or institution of education in said City without prescribing any rules by which the impartial execution of said ordinance may be secured or by which partiality and oppression in its execution can be prevented but subjecting inhabitants of said City to punishment by fines and imprisonment for
71 violation thereof, violate Section I of the XIV Amendment to the Constitution of the United States of America by undertaking to deprive persons of liberty or property without due process of law?

Said Court of Civil Appeals, in said cause, decided this question in the negative.

Eleventh question. Do the application and administration of said ordinance by the defendants in error in this case, acting as public authorities of the said City of San Antonio, in expelling plaintiff in error and her brother from the public schools of said City because she and her brother would not submit to vaccination while they knowingly permitted a great number of other pupils to continue attending said public schools without being vaccinated and in driving her and her brother away from the private schools they were attending after having been so expelled from said public schools when there had never been before even a pretence of enforcing said ordinance as to the private schools and other private institutions of said City, that is to say, in knowingly, systematically and intentionally discriminating against her and her said brother in enforcing said ordinance while they knowingly and intentionally permitted hundreds of other pupils in precisely like conditions and circumstances to continue to attend said public schools and without attempting to enforce said ordinance against any one else attending or connected with the private schools and private educational institutions in said City outside of her and her brother, come within the inhibition of the XIV Amendment to the Constitution of the United States of America?

Said Court of Civil Appeals decided this question in the negative.

Twelfth question. Do the laws of Texas afford plaintiff in error no redress and no remedy against and no relief from the said partiality, discrimination, and oppression practiced by the defendants in error toward her under the authority claimed by defendants in

error to be conferred upon them by said City to enforce
72 said ordinance?

Said Court of Civil Appeals, in said cause, decided that the laws of Texas afford her no redress, no remedy and no relief.

Thirteenth question. Are the provisions of Article 1639 of the Revised Statutes of the State relative to the making and conclusions of fact and law on all issues presented to Courts of Civil Appeals by proper assignments of error by any party to a cause mandatory upon such courts or do the provisions of said Article of the Statutes leave this discretionary to said courts?

Said Court of Civil Appeals, in said cause, in effect decided that the provisions of said Article were not mandatory upon said Court.

Plaintiff in error invokes the jurisdiction of this Court under Section 6 of Article 1521 of the Revised Statutes of this State.

Statement.

Since a general demurrer was sustained by the trial Court to the Second Amended Original Petition of plaintiff in error and her suit was dismissed, it will be necessary to set forth said petition in full in order to enable the Court to see that all the foregoing questions except the Thirteenth did arise.

"Now comes Rosalyn Zucht, by A. D. Zucht, next friend, plaintiff in the foregoing styled and numbered cause; and, by leave of the court, files this her second amended original petition in lieu of the first amended original petition filed in this cause on March 24th, 1919; and, for such second amended original petition, says that said plaintiff by said next friend, complains of W. A. King, E. O. Evans, Charles Gerlach, Ray Lambert, Guy S. McFarland, J. K. Beretta, Mrs. E. W. McCamish, Mrs. Henry Guerra, Mrs. Dan Leary, Paul Scholz, and Marshall Johnson; and avers that:

"1. All the parties, plaintiff and defendants, reside in Bexar County, Texas.

73 "2. There is a city in said Bexar County known as the City of San Antonio, which is duly incorporated by a special act of the Legislature of the State of Texas as a city having over ten thousand inhabitants, with territorial limits six miles square.

"3. There is also in said county an independent school district known as the San Antonio Independent School District, having the same territorial limits as the said City of San Antonio, which said independent school district is also duly incorporated by a special act of the Legislature of Texas; and its affairs are controlled by a special body of officers called the San Antonio School Board.

"4. The said City of San Antonio is a city having over 100,000 inhabitants and has a street car system operating on and over its principal streets transporting passengers on its cars during each and every day and for the greater part of each and every night, which

cars have seats where the passengers, consisting of men, woman and children, are seated in the closest juxtaposition; and said cars are daily and nightly crowded with passengers to such and extent frequently that there is hardly standing room in such cars, the passengers being almost literally packed in said cars. Said City has also a great number of theaters and other buildings where public shows are daily and nightly conducted and where great crowds of men, women and children gather daily and nightly for entertainment, and are seated in close personal contact. Likewise said City has a great number of churches where crowds of people, consisting of men, women and children, are in close personal contact at least once a week and frequently oftener. Said City also has within its limits quite a number of railway passenger depots where large crowds of people, consisting of men, women and children assemble in close personal contact daily and nightly. There is also in said City a public motor car service operating on a number of the principal streets daily and nightly transporting passengers, consisting of men, women and children, which passengers, are in the closest personal contact frequently sitting in each other's laps. There are also in said City a large number of factories where large numbers of men, women and children are employed in close personal contact
74 each and every day of the week except Sundays. There are in said City a large number of laundries where large numbers of men, women, boys and girls are employed working daily in close personal contact. There is also in said City what is known as the Mexican Quarter where the sanitary conditions are not good and where approximately 20,000 of the inhabitants of the said City reside closely crowded and where large crowds assemble in close personal contact daily and frequently at night. Said City also has a number of public parks where crowds of men, women and children gather frequently for recreation and where there are swimming pools in which great crowds of men, women and children bathe daily and nightly during the summer season. And on the principal streets of said City there are great crowds of people on the sidewalks daily and nightly in close personal contact, frequently amounting to jams. Said City has a large number of private educational institutions within its limits where children and persons over the age of twenty-one years are educated. There are, also have been for many years, a great number of public free school buildings in said City where public schools are conducted for the benefit of the children who are entitled to attend the same for educational purposes under the constitution and laws of the State and under the provisions of the special act of the Legislature incorporating the said San Antonio Independent School District. Said public free schools are under the exclusive control and management of the said San Antonio School Board under the law of this State. There are and have been for many years in said City a large number of private schools and institutions where great numbers of pupils both under the age of twenty-one years and over the age of twenty-one years constantly attend now and have constantly attended and are taught and have been taught in various branches of learning and skill, and there are now and have

been many other persons employed in, connected with, and attendant upon said private institutions.

"5. By Section 60 of the special act of the Legislature of the State of Texas incorporating the said City of San Antonio as a municipal corporation, the City Council of said City is clothed with the
75 power as follows:

"To prevent the introduction of contagious diseases into the City, to make quarantine laws for that purpose and to enforce the same within five miles of the city, and to make all ordinances and regulations to prevent the spread of any contagious diseases within the city limits; to enforce vaccination and to establish pest houses, and to regulate the establishment of private hospitals."

"And said special act of the Legislature confers upon said City Council and said municipal corporation no other power with reference to vaccination than the said powers set forth in said Section 60.

"6. The said City or its City Council has no power or control over the public free schools in said City, but the exclusive control and management of said public free schools are expressly vested in the said San Antonio Independent School District and the said San Antonio School Board by the special act of the Legislature incorporating said San Antonio Independent School District and San Antonio School Board.

7. No power is conferred upon said San Antonio Independent School District or said San Antonio School Board with reference to vaccination either in express terms or by necessary implication by the said special act of the Legislature incorporating the same.

"8. Under the said special act of the Legislature incorporating the said San Antonio Independent School District and San Antonio School Board all persons between the ages of seven years and twenty-one years have the right to attend the public free schools in said district and receive instruction therein and are entitled to all the benefits of the free school fund furnished by the State and the public free school fund derived from taxation in said district for free school purposes. Said San Antonio School Board is authorized and empowered by the terms of said special act incorporating said independent school district and school board to levy taxes on all the prop-
76 erty in said district subject to taxation for the purpose of acquiring grounds for public free school buildings, constructing school buildings thereon and equipping the same and for maintaining public free schools in said district during nine months of each and every year; and said School Board has exercised said powers for many years and has levied taxes and collected the same for many years and is still so doing.

"9. The said public free schools in said district are conducted in a thoroughly sanitary manner and every reasonable precaution has been taken to protect the health of the pupils attending the same. The grounds and buildings of said public free schools in said district are in most excellent sanitary condition and are so kept all the

time. All the public free school buildings in said district are provided with separate individual seats on which the pupils and all other persons connected with said schools are seated separate and apart from each other and are not in personal contact. The same is true with reference to the private schools and other educational institutions in said city.

"10. The said City and its said City Council have never attempted to enforce vaccination generally among the inhabitants of said City nor even among the children generally of said city; but undertook to arbitrarily discriminate against the pupils who attended the schools and educational institutions in said city and the persons connected with said schools and institutions in said city, including the pupils attending the same and the other persons connected therewith, by adopting an ordinance as follows:

"Section 25. No child or other person shall be permitted to attend any of the public schools, or any place of education within this city, unless such child or other person shall first present a certificate from some duly qualified physician to the city physician that such child, or other person, has been successfully vaccinated within six years preceding the time at which such child, or other person, desires to attend school. Such certificate shall give a description of such
77 child, or person, age and nativity, and kind of virus used, for which purpose, the city physician shall furnish the necessary blanks to all persons requiring the same.

Section 26. The city physician, or his assistant, shall give a certificate of such vaccination, or certify to the correctness of such certificate presented from some other physician, and such certificate or certified certificate, shall be presented to the superintendent, principal, or teacher of the school at which such child. or person seeks to be admitted before admission.

Section 27. Any person sending or attempting to send a child to any school or place of education within this city, without having it vaccinated in accordance with the provisions of this ordinance, and any physician giving a false certificate, and all persons admitting any child or other person to attendance in any such school or place of education without such certificate of vaccination, shall be guilty of a misdemeanor, and upon conviction therefor before the recorder shall be fined in any sum not less than ten dollars ($10.00), nor more than one hundred dollars ($100.00) for such offense, and each day such offense continues shall be deemed a separate offense, and upon failure to pay such fine such person may be imprisoned in the city jail not less than ten days nor more than thirty days.

Section 1. That it shall be the duty of all persons conducting any place, or institution, of education within the limits of the City of San Antonio to furnish the Board of Health, whenever so required, a list by name of all the teachers, pupils, and employes and other persons connected therewith in any capacity whatsoever, and statement duly certified by affidavit of such person or persons so conduct-

ing such place or institution or other person cognizant of such facts showing dates, time and place of vaccination of all teachers, pupils, employes and other persons connected therewith, if vaccinated, and, if not vaccinated, such statement shall show, provided that the Board of Health may require certificate of some duly qualified physician that such teachers, pupils, employes and other per-
78 sons connected therewith have been successfully vaccinated within seven years preceding the date of such report, such certificate to give description and other particulars to be furnished on such blanks as provided in Section 25 of Chapter 26.

"Section 2. Whenever, in the opinion of the Board of Health, it is necessary for the public health, or the health of any such place or institution of education set forth in Section 1 of the ordinance that all such teachers, pupils, employes and other persons therewith be vaccinated, said Board may require such vaccination within such period of time and under such regulations as said Board of Health may require."

"Section 3. Any person conducting any place or institution of education, who shall fail or refuse to furnish the list or statement or physician's certificate provided for in Section 1 of this ordinance, or any person whomsoever who shall fail to comply with the requirements of the Board of Health provided for in Section 2 of this ordinance, shall be deemed guilty of a misdemeanor and upon conviction therefor, shall be fined in any sum not less than Ten ($10.00) Dollars, or more than One Hundred ($100.00) Dollars, for such offense, and each day such offense continues, shall be deemed a separate offense, and upon failure to pay such fine such person may be imprisoned as provided for in the City Ordinances."

"Section 4. Every person being the parent or guardian or having the care, custody or control of any minor or other individual, shall (to the extent of any means, power and authority of said parent, guardian, or other person that could properly be used or exerted for such purpose) cause and procure such minor or individual to be promptly and effectively vaccinated, that the minor or individual shall not be liable to take the smallpox."

"Section 7. Any person violating any of the provisions of Sections 2, 3, 4, 5 and 6, shall be deemed guilty of an offense, and upon conviction shall be fined not less than five dollars ($5.00) nor more than one hundred dollars ($100.00) and in default of payment be committed to prison any number of days, not exceeding thirty, in the discretion of the recorder."

79 The said ordinance with reference to the pupils, teachers, employes or other persons connected with public schools and other educational institutions in said city is the only ordinance or regulation that has ever been adopted by the said city to enforce vaccination.

Plaintiff shows that the provisions in said so-called ordinance undertaking to inflict the punishment of a fine and imprisonment for

violations thereof, have never been enforced and there has been not the slightest attempt to enforce the same, though ever since the enactment of the said so-called ordinance, which was not less than thirteen years ago, many pupils and others have been continually attending public and private schools, places, and institutions of education, public and private, in said city without ever having been vaccinated and without ever having presented any certificates of vaccination as required by the terms of said so-called ordinance, and this with the full knowledge of the defendants; and said provisions for inflicting the punishment of a fine and imprisonment for violations of said so-called ordinance have always been treated and regarded by the officials of said city as a dead letter.

11. No valid reason existed or does exist for said discrimination. But, on the contrary, there was and is much more danger of the contagion of smallpox (which the advocates of vaccination will prevent) spreading from the close personal contact of persons in the assemblages and in the places other than the schools and educational institutions in said city hereinbefore named than there is such danger from the contact of the pupils, teachers, employes and other persons in said schools and educational institutions. Especially is this the case in the said Mexican Quarter of said city where the danger of the breaking out of the disease called smallpox is infinitely greater than in the said schools and educational institutions.

12. The said ordinance is not and was not intended to be a mere temporary measure to be in force only when there is an epidemic of smallpox in said city or when such an epidemic is imminent; but purports to be in force and is intended to be in force all the time where or not there is a single case of smallpox in said city, in said county or even within the State.

13. The said San Antonio Independent School District and the said Antonio School Board have no rule with reference to vaccination nor had they any such rule at the times hereinafter set forth.

14. The said Rosalyn Zucht is of the age of 15 years, and was and is entitled to attend the public free schools in said independent school district and to receive her proportionate part of the benefits of the public school fund provided under the laws and constitution of the State of Texas, including the fund produced by the said special tax in said district; and had been attending said public free schools during the months of January and February of the present year 1919, the public free school she had been attending being known as the Brackenridge High School in said independent school district.

15. The said Rosalyn Zucht never has been vaccinated nor is she willing to be vaccinated nor are her parents willing that she should submit to be vaccinated because she and her parents fear that vaccination will endanger her health and life. A large number of other pupils who had not been vaccinated, and had furnished no cer-

tificates of vaccination were attending said school and other public free schools in said district during the time that she was attending said school, and they were permitted to continue to attend said schools without having been vaccinated and without having furnished certificates of vaccination after she was expelled from said school as hereinafter set forth. She and her parents have a permanent home and reside in a locality in said City where there never has been a single case of smallpox, and they have continuously resided in said locality for many years. She has never been exposed to the contagion of smallpox, and the sanitary conditions in said locality where she and her parents have their said home are excellent, being a quiet residence portion of said city where the
81 inhabitants own their own homes and there is no crowding of houses close together and no crowds gather on the streets or elsewhere in said locality.

16. There is no epidemic of smallpox in said city now nor has there been such an epidemic in said city for more than ten years, nor is there any such epidemic imminent nor was there any such epidemic imminent at the time she was expelled from said school. Neither has there been any case of smallpox in said school that she was attending.

17. Yet, on, to wit: March 3rd, 1919, the present year, the defendants hereinbefore named conspired together to expel her from school, and said defendants and each of them acting wantonly and maliciously, refuse to permit her to attend said school any longer and prevent her from attending said school or any other public school in said city any longer unless she will submit to vaccination and the said defendants and each of them have thereby deprived her of the benefits of an education and of the benefits of her proportionate part of said public free school fund provided by the constitution and laws of Texas.

18. The said Ray Lambert is the Sanitary Commissioner of said City having the control and management, at least ostensibly, of the Health Department of said city, the said W. A. King is the Health Officer, City Physician, and the active manager of the Board of Health of said city, the said E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. Dan Leary, Mrs. Henry Guerra, and Mrs. E. W. McCamish are members of and constitute the San Antonio School Board, having the exclusive control and management of the public free schools in said San Antonio Independent School District, the said Paul Scholz is the Business Agent of said San Antonio School Board, and the said Marshall Johnson is the principal having charge and control of the said public free school that the said Rosalyn Zucht has been attending and from which she was expelled as aforesaid.

19. By the terms of the said special act of the Legislature of Texas incorporating the said City of San Antonio as a municipal

corporation, all the legislative powers and authority delegated
82 to said municipal corporation by said special act were and are vested in the City Council of said city, composed now of what are called commissioners of whom the said Ray Lambert is one; and no legislative powers or authority whatever were vested in said Board of Health; nor did nor does said City Council have any power or authority to delegate their legislative powers and authority to said Board of Health or to any one else.

20. The said defendants pretend to have acted in their official capacities in expelling the said Rosalyn Zucht from said school and in refusing to permit her to attend the public free schools of said independent district any longer unless she would submit to be vaccinated, and profess to have acted in obedience to said ordinance. But the said plaintiff avers that this is not and was not true. Many other pupils and other persons were attending the said school that she was attending as well as the other public free schools of said independent school district and other educational institutions that had not been vaccinated and had not complied with said ordinance and had never presented certificates of vaccination as required by said ordinance, and yet said other pupils and persons were permitted to continue to attend said school and said other schools and other educational institutions after said plaintiff had been expelled without having complied with said ordinance and without having been vaccinated and without having presented any certificate of vaccination as required by said ordinance. And there is and always has been not even a pretense of enforcing said ordinance against the pupils of and the persons connected with the private schools and educational institutions in said city; but the pupils of and the persons connected with said private schools and educational institutions in said city are now and continuously have been permitted to attend the same without having been vaccinated and without having presented any certificates of vaccination as required by said ordinance except that, when the plaintiff herein and her brother undertook to attend one of said private schools without having been vaccinated, the authorities of said city, being the defendants herein and
83 especially the said W. A. King, notified the principal of said private school that, if he continued to permit the plaintiff and her brother, Arthur Zucht, to continue to attend said private school, they would close his school, and thereupon the plaintiff and her brother were compelled to cease attending said private school. The conditions and circumstances as to said other schools and educational institutions with reference to smallpox were and are precisely the same as those as the school plaintiff was attending.

The foregoing facts are and were well known to the defendants and each of them, yet the defendants and each of them wantonly and maliciously discriminated against plaintiff because plaintiff would not submit to vaccination and for other unlawful reasons, and wantonly and maliciously refuse to permit plaintiff to attend any of said public schools.

21. By reason of having been expelled from said public free school and by reason of being refused permission to attend any of the public free schools in said city, the plaintiff has been humiliated and put to shame and her feelings have been injured and her standing in the community has been injured; and thereby plaintiff has been damaged by the defendants and by each of them in the sum of, to wit: ten thousand dollars.

22. The said ordinance, by reason of discriminating against the pupils of and the other persons connected with said schools and other educational institutions in said city and undertaking to compel the pupils attending and the other persons connected therewith to submit to vaccination as a condition precedent to their being permitted to attend such schools and other educational institutions or to be connected therewith and undertaking to compel parents, guardians and other persons having the care, custody or control of other persons to cause or procure the persons under their care, custody or control to be vaccinated, and thus placing a burden upon such pupils and other persons and other- connected with said schools and other educational institutions in said city and parents
84 and guardians and persons having the care of other persons that is not placed upon other inhabitants of said city in like conditions and under like circumstances, is unreasonable, deprives such pupils and other persons, including plaintiff, of their rights and privileges without due course of the law of the land in violation of Section 19 of Article 1 of the Constitution of the State of Texas; and said ordinance denies to such pupils including plaintiff herein, and other persons connected with said schools and other educational institutions in said city of the equal protection of the laws in violation of the XIV Amendment to the Constitution of the United States of America; and said ordinance is, therefore, absolutely void.

23. Further, said ordinance, by undertaking to leave to the arbitrary discretion of said Board of Health when or under what circumstances vaccination shall be enforced against the pupils of and the other persons connected with said schools and other educational institutions in said city and in leaving it to the arbitrary discretion of said Board of Health as to which of such schools and educational institutions in said city vaccination shall be enforced without providing any rule by which said Board of Health is to be guided in its action and without providing any safeguards against partiality and oppression, is absolutely void, being in violation of the XIV Amendment to the Constitution of the United States.

24. The said partial, discriminatory and oppressive manner in which said ordinance has always been administered by the authorities charged with its administration and is still being administered is a denial by the State of Texas through its executive department to plaintiff and others of the equal protection of the laws in violation of the XIV Amendment to the Constitution of the United States of America.

26. Unless restrained and prohibited as hereinafter prayed, the said defendants and each of them will continue to dis-
85 criminate against plaintiff in the manner hereinbefore alleged and will continue to exclude her from attending said public free schools in said city and will continue to deprive her of her said rights, privileges and benefits; and will continue to enforce against plaintiff said void ordinance and will continue to let the said other pupils and persons attend said schools and other educational institutions without complying with said so-called ordinance.

Premises considered, plaintiff by her said next friend, sues, and all the defendants herein having already been duly served with citation herein and having already appeared and answered herein, plaintiff prays that upon final hearing, plaintiff have judgment against the said defendants and against each of them for the amount of her said damages and all costs of this suit; that a writ of injunction issue perpetually restraining and prohibiting the defendants and each of them from discriminating against plaintiff; and that a writ of injunction issue restraining and prohibiting the defendants and each of them from enforcing or attempting to enforce the void ordinance against plaintiff; and that a peremptory writ of mandamus issue compelling the defendants and each of them to admit plaintiff to attendance in and upon said public free schools. Plaintiff also prays for such relief, general or special, as plaintiff may be entitled to under the facts hereinbefore set forth." (Trans. pp. 1 to 14, inclusive.)

The defendants in error presented general exceptions to the foregoing petition (Trans. pp. 17, 31, 32), which general exceptions were sustained by the Trial Court, and plaintiff in error, through her next friend, having declined to amend, her suit was dismissed and she gave notice in open court of appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas. She duly perfected her appeal, but, on said appeal, the judgment of the trial Court was affirmed. Within due time, plaintiff in error filed a motion for a rehearing in said Court, in which motion for a rehearing, all
86 of the errors hereinafter assigned were duly called to the attention of the said Court of Civil Appeals. Said motion for a rehearing was overruled on November 17th, 1920.

First Assignment of Error.

The Court of Civil Appeals erred in holding that the power and authority to enforce vaccination conferred upon the City of San Antonio by the special charter granted to said City by the act of Legislature gives power to the City Council of said City to enact an ordinance requiring inhabitants of said City to be vaccinated regardless of whether or not there is a single case of smallpox in the State.

First Proposition.

The ordinance of the City of San Antonio, relative to vaccination requires all persons attending upon or connected with the public

schools and other educational institutions in said City to be vaccinated regardless of whether or not there is a single case of smallpox in said City, in the State or even in the United States.

Statement.

The ordinance of the City of San Antonio relating to vaccination is set forth in hæc verba in the second amended original petition of plaintiff in error, which has already been set forth in this brief, and to which reference is hereby made.

Second Proposition.

The power conferred upon the City of San Antonio by its Charter "to enforce vaccination" does not give to the City Council of said City the power to enact an ordinance requiring its inhabitants to be vaccinated regardless of whether or not there is a single case of smallpox in the State, or in the United States, for that matter.

Second Assignment of Error.

The Court of Civil Appeals erred in holding that the ordinance enacted by the City Council of the City of San Antonio requiring the persons attending upon or connected with the public schools and other educational institutions in said City to be vaccinated regardless of whether there is a single case of smallpox in said Ctiy, in the State or even in the United States, is not void.

87

First Proposition.

In order for an ordinance of a municipal corporation to be valid, it must be reasonable.

Authorities.

City of Austin vs. Cemetery Asso. 87 Tex. 330.
Milliken vs. City Council, 54 Tex. 388.
Mills vs. M. K. & T. Ry. Co. 94 Tex. 242.
Ex parte McCarver, 46 S. W. 936.
Ruling Case Law, Vol. 19, p. 805, Sec. 112.

Second Proposition.

The ordinance of the City of San Antonio requiring all persons attending or connected with the public schools and other educational institutions in the City to be vaccinated regardless *or* whether or not there is a single case of smallpox in said City, in the County, in the State or even the United States, is unreasonable.

Authorities.

Potts vs. Breen, 47 N. E. 81; 39 L. R. A. 152.
People vs. Chicago Board of Education, 84 N. E. 17 L. R. A. (N. S.) 709.
Mathews vs. Kalamazoo Board of Education, 86 N. W. 1036 (Mich.) 54 L. R. A. 736.
State vs. Burdge 70 N. W. 347 (Wisc.); 37 L. R. A. 157.

Third Assignment of Error.

The Court of Civil Appeals erred in holding that the mere fact, that the said special charter of said City confers upon said City power to enforce vaccination, deprives the Courts of power to enquire into and determine whether or not an ordinance enacted by the City Council of said City to enforce vaccination is reasonable.

Proposition.

The mere fact, that the Legislature has conferred upon the
88 City Council of the City of San Antonio the power to enforce vaccination in general terms, does not deprive the Courts of the power to enquire whether the City has exercised the power conferred upon it in a reasonable manner.

Authorities.

Milliken vs. City Council, 54 Tex. 388.
Mills vs. Ry. Co. 94 Tex. 247.
H. & T. C. Ry. Co. vs. City of Dallas, 98 Tex. 396.

Fourth Assignment of Error.

The Court of Civil Appeals erred in not holding that the said ordinance of the City of San Antonio, in requiring some of the inhabitants of said City to be vaccinated under pain of fine and imprisonment, regardless of whether or not there is a single case of smallpox within the State of Texas, or even within the United States, violates Section 9 of Article I of the Constitution of the State protecting the people of the State in their persons from all unreasonable seizures and searches.

First Proposition.

The seizure of a man's person and putting him in jail for his failure or refusal to obey an ordinance requiring him to be vaccinated when there is not a single case of smallpox within the limits of the State or even within the limits of the United States, is an unreasonable seizure of his person within the meaning of Section 9 of Article I of the State Constitution.

Statement.

It will be observed that the Ordinance of the City of San Antonio relating to vaccination provides for the infliction of a fine and imprisonment as a punishment for a violation of its provisions. See statement showing how the questions of law in the case arose, immediately following the statement of the questions decided by the Court of Civil Appeals, which statement sets forth in hæc verba the ordinance of the City of San Antonio in question.

Authorities.

We have been unable to find any decision of any Court as to what is an unreasonable seizure of one's person within the meaning of the provision of the Constitution of the United States, of the
89 Constitution of the State and of the Constitutions of a number of other States, protecting persons against unreasonable seizure of their persons and property, but we regard the case of Wragg vs. Griffin, 170 N. W. decided by the Supreme Court of Iowa, as in point.

Second Proposition.

The mere fact, that plaintiff in error has never been arrested or put in jail for violating the provisions of the Ordinance of the City of San Antonio relating to vaccination, does not deprive her of the right to complain of the invalidity of said Ordinance in the respect set forth in the immediately foregoing Assignment of Error, since she shows that she has been already injuriously affected by said ordinance.

Authorities.

Coe vs. Armour Fertilizer Works, 237 U. S., 413.

Fifth Assignment of Error.

The Court of Civil Appeals erred in not holding that the general power and authority to enforce vaccination conferred by the special charter granted to the City of San Antonio by the act of the Legislature of the State, does not confer any power or authority upon the City Council of said City to discriminate by ordinance in such manner as to enforce vaccination against certain inhabitants of said City and leave other inhabitants of said City in like circumstances and under like conditions free from the enforcement of vaccination.

First Proposition.

The language of the special charter granted to the City of San Antonio with reference to vaccination, merely conferring power upon the City Council of said City "to enforce vaccination," *this*

language means simply that said City Council has power to enforce vaccination upon all the inhabitants of said City in like conditions and under like circumstances when facts may exist in said City which may make it reasonably necessary to enforce vaccination as a means of preventing the spreading of the disease called smallpox.

90 Second Proposition.

Said language of said charter does not confer upon the City Council of said City the power to discriminate among the inhabitants of said City and thereby require certain of the inhabitants of said City to be vaccinated while this burden is not placed upon other inhabitants of said City under like conditions and circumstances and even under worse conditions and circumstances with reference to the spread of smallpox.

Statement.

The special charter of the City of San Antonio confers power upon the City Council in said City in the following language: "To enforce vaccination." See clause 5 of the second amended original petition of plaintiff in error hereinbefore set forth.

Sixth Assignment of Error.

The Court of Civil Appeals erred in not holding that the ordinance of the City of San Antonio, in requiring that all the persons attending the public schools and other educational institutions in said City and all persons connected with said schools and educational institutions to be vaccinated, but requiring no other persons in said City to be vaccinated no matter what may be the circumstances or conditions in which said other inhabitants may be and though the circumstances and conditions of such other inhabitants may be precisely like the circumstances and conditions of the persons attending and connected with the public schools and other educational institutions in said City, is not a reasonable classification of said inhabitants.

Proposition.

The ordinance of the City of San Antonio requiring all persons attending the public schools and other educational institutions in said City and all persons connected with such public schools and educational institutions to be vaccinated but requiring no other persons in said City to be vaccinated no matter what may be the circumstances and conditions of such other persons in said City, is unreasonable, and said ordinance is, therefore, void.

Statement.

See clauses 4, 9 and 11 of the second amended original
91 petition of plaintiff in error hereinbefore set forth. The

general demurrers of the defendants in error to said petition of plaintiff in error, including the allegations of fact contained in said clauses, were sustained by the trial Court and her suit was dismissed. Upon appeal to the Court of Civil Appeals, the judgment of the trial Court was affirmed.

Authorities.

Borough of Sayre vs. Phillips, 16 L. R. A., 49, (Pa.)
State vs. Gardner, 41 L. R. A. 689, (Ohio).
Ex Parte McCarver, 46 S. W., 936.
Town of Kosciusko vs. Slomberg, 12 L. R. A. 528, (Miss.).
Yick Wo vs. Hopkins, 118 U. S., 356, (29 Law Ed. 220).
Carrollton vs. Bazette, 31 L. R. A., 523.
Re Garrabad, 19 L. R. A., 858, (Wis.); and see review of decisions with reference to discrimination in Note to this case.
Hawes vs. City of Chicago, 30 L. R. A., 225, (Ill.).
Ex Parte Frank, 28 Am. Rep., 642, (Cal.).
Chicago vs. Rumpff, 92 Am. Dec., 196, (Ill.).
Grafty vs. City of Rushville, 57 Am. Repp. 128, (Ind.).
Simrall vs. City of Covington, 14 S. W., 369, (Ky.) 28 Cyc., 370.

Seventh Assignment of Error.

The Court of Civil Appeals erred in not holding that the City ordinance violates the provisions of the XIV Amendment to the Constitution of the United States in that said ordinance lays burdens, in the way of vaccination, penalties and imprisonment, upon some persons inhabitants of said City and leaves the other inhabitants of said City in like conditions and under like circumstances, (and even worse), free from such burdens.

First Proposition.

While a law of a State or an ordinance of a municipality in a State, in laying burdens upon the persons inhabiting the
92 same may classify such inhabitants and may place burdens upon one class that are not placed upon another class, still such classification must be based upon some natural and reasonable distinction in order not to violate the XIV Amendment to the Constitution of the United States, forbidding a State to deny to any person within its jurisdiction the equal protection of the laws; neither a State Legislature nor a City Council can, by its laws, make a classification that does not rest on some difference which bears a natural, reasonable and just relation to the act in respect to which the classification is proposed.

Statement.

The ordinance of the City of San Antonio in question, undertakes to classify the inhabitants of said City into two classes with

respect to vaccination and places all persons attending or connected with the public schools and educational institutions in said City, in one class, subjecting them to the burdens of vaccination, fines and imprisonment, while it places all other persons inhabiting said City, regardless of their conditions and circumstances with reference to smallpox, in another class, leaving them free from said burdens. See the ordinance of said City on the subject of vaccination, which is set forth in full in clause 10 of the second amended original petition of plaintiff in error hereinbefore set forth.

Authorities.

Ex Parte, Leo Jentzsch, 32 L. R. A. 664, (Cal.).
Pasadena vs. Stimson, 91 Cal. 238.
Darcey vs. San Jose, 104 Cal. 642.
Lavallee vs. St. Paul, M. & M. Ry. Co. 40 Minn. 249; 41 N. W. 974.
Bedford Quarries Co. vs. Bough, 14 L. R A. (N. S.) 418, (Ind.).
State vs. Varbroski, 56 L. R. A. 570, (Iowa).
Sutton vs. State, 33 L. R. A. 589; 36 S. W. 697, (Tenn.).
State vs. Loomis, 21 L. R. A. 789, (Mo.).
Evansville vs. State, 4 L. R. A. p. 97, (Ind.).
Van Harlingen vs Doyle, 54 L. R. A., 771, (Cal.).
Chicago &c. Ry. vs. Chicago, 166 U. S., 234; 41 Law Edi. 984.
Johnson vs. St. Paul, &c. Co. 8 L. R. A., 419, (Minn.).
93 G. C. & S. F. Ry. Co. vs. Ellis, 165 U. S., 150; 41 Law Edi. 666.
State vs. Haun, 47 L. R. A. 369, (Kansas).
State vs. Goodwill, 6 L. R. A. 621, (West Va.).
Louthan vs. Commonwealth, 52 Am. Rep., 626, (Va.).
Attorney General vs. Detroit, 55 Am. Rep. 675, (Mich.).
Off vs. Morehead, 20 L. R. A., (N. S.) 167.
People vs. Wilber, 27 L. R. A., (N. S.), 357.
Low vs. Rees Print Co., 24 L. R. A., 702.
Dibrell vs. Lanier, 12 L. R. A., 70; 15 S. W., 87.
Cummings vs. Merchants National Bank, 101, U. S., 153; 25 L. Edi. 903.

Eighth Assignment of Error.

The Court of Civil Appeals erred in not holding that the said ordinance of the City of San Antonio is void in that the said Council of said City, by the terms of said ordinance, undertakes to delegate its legislative authority to the Board of Health of said City.

First Proposition.

Under what circumstances it is necessary for the public health of said City or for the health of any place or institution of education

in said City that all teachers, pupils, employes and other persons connected with such educational institutions shall be vaccinated, is a question for legislative determination.

Statement.

The Section numbered 2 of said ordinance is as follows: "Section 2: Whenever, in the opinion of the Board of Health, it is necessary for the public health, or the health of any such place or institution of education set forth in Section 1 of the ordinance that all such teachers, pupils, employes and other persons therewith (connected) be vaccinated, said Board may require such vaccination within such period of time and under such regulations as said Board of Health may require." (Transp. p. 7.)

Authorities.

Dowling vs. Lancashire Ins. Co., 31 L. R. A., 112.
St. Louis vs. Russell, 20 L. R. A., 721 (Mo.), and note.
Hydes and Goose vs. Joyes, 96 Am. Dec., 311, (Ky.), and Note.
Thompson vs. Schermerhorn, 55 Am. Dec., 385; (N. Y.) and Note.
Crowell vs. Bristol, 20 L. R. A., 653 (Va.) and Note.
Birdsall vs. Clark, 29 Am. Rep., 105, (N. Y.)
28 Cyc. 276, and authorities cited in Note, 35, p. 227, 19 Ruling Case Law, p. 896, Sec. 195, and decisions cited in Notes.

Second Proposition.

The City Council of the City of San Antonio has no power to delegate its legislative authority, yet having undertaken, by the terms of said ordinance, to delegate its legislative authority to the City Board of Health, said ordinance is absolutely void.

Authorities.

Missouri, &c. Ry. Co. vs. Shannon, 100 Tex. 379.
Willis vs. Owen, 43 Tex. 41.
Dowling vs. Lancashire Ins. Co., 31 L. R. A. 112.

Ninth Assignment of Error.

The Court of Civil Appeals erred in not holding said ordinance of the City of San Antonio void because said ordinance undertakes to leave it to the arbitrary discretion of the Board of Health of said City to determine whether or not it is necessary for the public health of said City or for the health of any place or institution of education in said City that all the teachers, pupils, employes or other persons connected with such place or institution of education should be vaccinates, and undertakes to clothe said Board with power to require

such vaccination within such period of time and under such regulations as such Board may require without laying down any rules by which the impartial execution of said ordinance may be secured or by which partiality and oppression in its execution can be prevented.

First Proposition.

By the terms of said ordinance, it is left to the arbitrary discretion of the Board of Health of the City of San Antonio to determine whether it is necessary for the public health of said City or
95 the health of any educational institution in said City that all the persons attending such educational institution and all persons connected therewith should be vaccinated.

Statement.

See statement under the immediately preceding assignment of error.

Second Proposition.

Said ordinance lays down no rules by which the impartial execution of said ordinance may be secured or by which partiality and oppression in its execution can be prevented.

Third Proposition.

An ordinance of a municipality, penal in its character, that undertakes to confer arbitrary discretion upon executive officers to determine when and under what circumstances such ordinance shall be enforced without laying down any rules by which the impartial execution of such ordinance may be secured or by which partiality and oppression in its execution can be prevented, is void.

Authorities.

Yick Wo. vs. Hopkins, 118 U. S., 220; 30 Law. Edi. 220.
Baltimore vs. Radeck, 49 Md., 217.
Ex Parte Sing Lee, 24 L. R. A., 196.
Cicero Lumber Co. vs. Cicero, 42 L. R. A., 704.
City of Richmond vs. Dudley, 13 L. R. A., 589.
Sioux Falls vs. Kirby, 25 L. R. A., 623.
State vs. Tennant, 15 L. R. A., 424.

Tenth Assignment of Error.

The Court of Civil Appeals erred in not holding that the said ordinance of the City of San Antonio violates Section 1 of the XIV Amendment to the Constitution of the United States of America by undertaking to deprive persons of liberty or property without due process of law in that said ordinance leaves it to the arbitrary dis-

cretion of the Board of Health of said City to determine when
96 and under what circumstances vaccination shall be enforced as to any place or institution of education in said City without prescribing any rules by which the impartial execution of said ordinance may be secured or by which partiality and oppression in its execution can be prevented, yet subjecting inhabitants of said City to punishment by fines and imprisonment for violation of said Ordinance.

Proposition.

Since said ordinance of the City of San Antonio leaves it to the arbitrary discretion of the Board of Health of said City to determine when and under what circumstances vaccination shall be enforced as to any place or institution of education in said City without prescribing any rules by which the impartial execution of said ordinance may be secured or by which partiality and oppression in its execution can be presented, yet subjecting inhabitants of said City to punishment by fines and imprisonment for violations thereof, it violates Section I of the XIV Amendment to the Constitution of the United States and is therefore, absolutely void.

Authorities.

Yick Wo. vs. Hopkins, 118 U. S., 356, (30 Law Ed. 220).
In Re Christensen, 43 Fed. 245.
Baltimore vs. Radeck, 49 Md., 217.
Ex Parte Sing Lee, 24 L. R. A., 196.
Cicero Lumber Co. vs. Cicero, 42 L. R. A., 704.
City of Richmond vs. Dudley, 13 L. R. A., 589.
Sioux Falls vs. Kirby, 25 L. R. A., 623.
State vs. Tenant, 15 L. R. A., 424.

Eleventh Assignment of Error.

The Court of Civil Appeals erred in not holding that the application and administration of the said ordinance of the City of San Antonio by defendants in error, acting as public authorities of said City of San Antonio, in expelling plaintiff in error and her brother from the public schools of said City because she and her brother would not submit to vaccination while defendants in error knowingly
97 permitted a great number of other pupils who had not been vaccinated yet who were in precisely the same circumstances and conditions as she and her brother to continue attending said public schools without being vaccinated, and in driving her and her brother away from the private school that they were attending after having been so expelled from said public schools because they would not submit to vaccination when there never had been before even a pretence of enforcing said ordinance as to the private schools and other private institutions of education in said City and not even attempting to enforce said ordinance as to other pupils in said private schools and other institutions of education in said City, do come

within the inhibition of the XIV Amendment to the Constitution of the United States.

Proposition.

Even if the said ordinance of the said City of San Antonio had been fair on its face and impartial in appearance, yet, since it is applied and administered by defendants in error, acting as public authorities of said City, with an evil eye and an unequal hand so as to practically make unjust and illegal discriminations in similar circumstances, and thereby plaintiff in error has been denied equal justice, the said application and administration of said ordinance by defendants in error, acting as public authorities of the said City, come within the inhibition of the XIV Amendment of the Constitution of the United States, in that said application and administration of said ordinance by defendants in error deny to plaintiff in error the equal protection of the laws.

Statement.

The second amended original petition of plaintiff in error contains the following allegations, which were admitted to be true by the general demurrers of the defendants in error, to-wit: "20. The said defendants pretend to have acted in their official capacities in expelling the said Rosalyn Zucht from said school and in refusing to permit her to attend the public free schools of said independent dis-
98 trict any longer unless she would submit to be vaccinated, and profess to have acted in obedience to said ordinance. But the said plaintiff avers that this — not and was not true. Many other pupils and other persons were attending the said school that she was attending as well as the other public free schools of said independent school district and other educational institutions that had not been vaccinated and had not complied with said ordinance and had never presented certificates of vaccination as required by said ordinance, and yet said other pupils and persons were permitted to continue to attend said school and said other schools and other educational institutions after said plaintiff had been expelled without having complied with said ordinance and without having been vaccinated and without having presented any certificates of vaccination as required by said ordinance. And there is and always has been not even a pretence of enforcing said ordinance against the pupils of and the persons connected with the private schools and educational institutions of said city; but the pupils of and the persons connected with said private schools and educational institutions in said city are now and continuously have been permitted to attend the same without having been vaccinated and without having presented any certificates of vaccination as required by said ordinance except that, when the plaintiff herein and her brother undertook to attend one of said private schools without having been vaccinated, the authorities of said city, being the defendants herein and especially the said W. A. King, notified the principal of said private school that, if he continued to permit the plaintiff and her brother, Arthur Zucht, to continue to

attend said private school, they would close his school, and thereupon the plaintiff and her brother were compelled to cease attending said private school. The condition and circumstances as to said other schools and educational institutions with reference to smallpox were and are precisely the same as those that the school plaintiff was attending.

99 The foregoing facts are and were well known to the defendants and each of them, yet the defendants and each of them wantonly and maliciously discriminated against plaintiff because plaintiff would not submit to vaccination and for other unlawful reasons, and wantonly and maliciously refuse to permit plaintiff to attend any of said public schools." (Trans. pp. 11 and 12.)

Authorities.

Yick Wo vs. Hopkins, 118 U. S., 356, 30 Law Edi. 220.
Scott vs. McNeal, 154 U. S., 34; (38 Law Edi. 896.)
Ex Parte Virginia, 100 U. S., 339; (25 Law Edit., 676.)
Carter vs. Texas, 177 U. S., 442; (44 Law Edi., 839).
Smith vs. State, 58 S. W., 97.

Twelfth Assignment of Error.

The Court of Civil Appeals erred in holding that, notwithstanding the wilful and malicious discrimination practiced by defendants in error toward plaintiff in error in administering said ordinance of the City of San Antonio and notwithstanding the wilful and malicious persecution and oppression of plaintiff in error by defendants in error pretending to act under the authority of said ordinance, the plaintiff in error has no redress and no remedy and no relief under the laws.

Proposition.

The wilful and malicious discrimination against plaintiff in error practiced by defendants in error under the color of the authority given them by said ordinance and the wilful and malicious persecution and oppression of plaintiff in error by defendants in error under the pretence of enforcing said ordinance in expelling her from the public schools of said City on account of her refusal to submit to vaccination while they, defendants in error, knowingly and intentionally permitted other pupils of said public schools who had not been vaccinated, to continue attending said public schools without being vaccinated, and in driving defendant in error away from the private school that she was attending after she had been

100 expelled from said public schools when there never had been before even a pretence of enforcing said ordinance as to the private schools and other private institutions of education in said City, and they, defendants in error, did not even attempt to enforce said ordinance against any one else in said private schools and other private institutions of education, was a wrong to plaintiff in error

causing her an injury; and, for every wrong done by one person to another, working an injury, the laws afford an appropriate remedy.

Statement.

See statement under the immediately preceding Assignment of Error for a statement of the facts constituting the wilful and malicious discrimination practiced by defendants in error against plaintiff in error and the partiality, oppression and persecution practiced by defendants in error against plaintiff in error. By her second amended original petition, plaintiff in error seeks to recover damages against each and all of the defendants in error on account of the wrong done to her; and she prays for the issuance of a writ of injunction prohibiting the defendants in error and each of them from discriminating against her; and she also prays for general relief. (Trans. p. 14).

Authorities.

——— ———.
——— ———.

Thirteenth Assignment of Error.

The Court of Civil Appeals erred in failing to decide all the issues of law presented by the Assignments of Error made by plaintiff in error wherein plaintiff in error assigned as error the rulings of the trial Court in overruling her special exceptions to the third amended original answer of defendants in error, Evans, Gerlach, McFarland, Beretta, McCamish, Guerra, Scholz and Johnson, and in failing to decide the issue of law presented by any of said Assignments
101 of Error, and in failing to make conclusions of law in writing as to each of said Assignments of Error as required by Article 1639 of the Revised Statutes of the State.

Proposition.

Article 1639 of the Revised Statutes of the State making it the duty of the Courts of Civil Appeals to decide all issues presented to them by proper Assignments of Error by either party in a cause pending in said Court, whether such issues be of fact or of law, and making it the duty of said Courts to announce in writing their conclusions so found, is mandatory upon the Courts of Civil Appeals; and the Statute leaves no discretion to the Courts of Civil Appeals as to this.

Statement.

Plaintiff in error presented by nine Assignments of Error nine issues of law calling in question the correctness of the rulings of the trial Court in overruling certain special exceptions urged by her to the third amended original answer of the defendants in error, Evans, Gerlach, McFarland, Beretta, McCamish, Guerra, Scholz and John-

son, (Trans. pp. 37-38). These Assignments of Error were presented to the Court of Civil Appeals in the printed brief of plaintiff in error filed in said Court beginning on page 24 and ending on page 45 of said brief. (See printed brief of plaintiff in error filed in the Court of Civil Appeals.)

The Court of Civil Appeals paid no attention whatever to these Assignments of Error.

Authorities.

Revised Statutes, Article 1639.

We call the attention of the Court to the Legislative history connected with the adoption of this Article of the Revised Statutes.

Conclusion.

Plaintiff in error shows to the Court that the defendants in
102 error are, W. A. King, E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. E. W. McCamish, Mrs. Henry Guerra, Mrs. Dan Leary, Paul Scholz and Marshall Johnson, all of whom reside in the City of San Antonio in Bexar County, Texas, which City is their post office address; and the attorneys of record of said defendants in error are, B. W. Teagarden, R. L. Ball, R. J. McMillan, and J. D. Dodson, all of whom reside in said City of San Antonio and said City is their post office address.

Plaintiff in error prays that this her application for writ of error be granted, and that, upon hearing of the cause the judgment of the trial Court and the judgment of the Court of Civil Appeals affirming the judgment of the trial Court be reversed and that the cause be remanded to the trial Court for a trial of the cause on its merits.

DON A. BLISS.
Attorney for Plaintiff in Error.

Endorsed: Rosalyn Zucht by Next Friend, Plaintiff in Error, vs. W. A. King et al., Defendants in Error. Application for a Writ of Error. Filed in the Court of Civil Appeals at San Antonio, Texas, Dec. 14, 1920, Jos. Murray, Clerk.

Judgment of the Supreme Court of Texas.

In Supreme Court of Texas.

ROSALYN ZUCHT

vs.

W. A. KING et al.

From Bexar County, Fourth District.

February 9th, 1921.

This day came on to be heard the application of plaintiff in error for a writ of error to the Court of Civil Appeals for the Fourth District and the same having been duly considered, it is ordered that said application be Refused; That the applicant, Rosalyn Zucht, by next friend, and sureties, J. L. Feller, W. M. Pardue, G. S.
103 Lincoln, M. D. & Jas. Burman, pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court, this the 25th day of Febry., A. D. 1921.

[SEAL.]

F. T. CONNERLY,
Clerk,

By B.,
Deputy.

Endorsed: Application No. 11920. Rosalyn Zucht vs. W. A. King, et al. Copy of Judgment in Supreme Court. Application for Writ of Error refused. Filed in the Court of Civil Appeals at San Antonio, Texas, Feb. 28, 1921, Jos. Murray, Clerk.

104 In the Supreme Court of the United States.

No. —.

In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

No. 6428.

ROSALYN ZUCHT, by A. D. ZUCHT, Next Friend, Plaintiff in Error,

vs.

W. A. KING et al., Defendants in Error.

Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

Assignment of Errors.

Now comes Rosalyn Zucht, by her next friend, A. D. Zucht, and through Don A. Bliss, her attorney; and, in connection with her petition for a writ of error shows that, in the record and proceedings and in the rendering of the judgment and decision of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas in the foregoing styled cause, manifest error has intervened to the prejudice of this petitioner and plaintiff in error in this, to-wit:

1. The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas erred in holding that the Ordinance or Statute of the City of San Antonio, Texas, in putting those who attend the schools and other educational institutions in said city and those connected therewith in a class against whom vaccination is to be enforced and leaving the other persons in said city free from such a burden though in precisely the same conditions and under precisely the same circumstances as the persons attending said schools and educational institutions and persons connected therewith, does not violate the XIV Amendment to the Constitution of the United States.

2. The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas erred in deciding that the said Ordinance or Statute of the said City of San Antonio, Texas, is not repugnant to the XIV Amendment to the Constitution of the United States in leaving it to the arbitrary discretion of the Board of Health of said city to determine whether it is necessary for the public health of any place or institution of education in said city that all the teachers, pupils, employes or other persons connected therewith be vaccinated and in undertaking to clothe said Board of Health with power to require said vaccination within such period of time and under such regulations as such Board of Health may require, without laying
105 down any rule by which the impartial execution of the power vested in said Board can be secured or partiality and oppression can be prevented.

3. The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas erred in deciding that the application and administration of said Ordinance or Statute of the said City of San Antonio, Texas, by the Defendants in Error as the authorities of said city in expelling Plaintiff in Error from the public schools of said city because she would not submit to vaccination and her parents would not permit her to be vaccinated because of a belief on her and their part that vaccination would endanger her health and life while the Defendants in Error knowingly permitted many other pupils to continue attending said public schools without being vaccinated and without in any way complying with said Ordinance or Statute of said city, though such other pupils were in precisely the same condition and were under precisely the same circumstances as Plaintiff in Error, and in thus administering said Ordinance or Statute of said city as such officials with an evil eye and an unequal hand, do come within the inhibition of the XIV Amendment to the Constitution of the United States.

4. The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas erred in deciding that the action of the defendant W. A. King as the health officer of said city, professing to act under the authority of said Ordinance or Statute of said city, in compelling the principal of the private school which Plaintiff in Error and her brother Arthur Zucht were attending after they had been expelled from the public schools of said city as aforesaid to expel Plaintiff in Error and her said brother from said private school on account of their refusal to submit to vaccination for the reasons aforesaid when the said King knowingly permitted the other pupils attending said private school to continue their attendance upon such school without being vaccinated and without complying with said Ordinance or Statute of said city in any way, though said other pupils so attending said private school were in precisely the same condition and under precisely the same circumstances as those that Plaintiff in Error and her said brother were in, and when there never had been any pretense of enforcing said Ordinance or Statute of said city as to the pupils attending private schools in said city or as to other persons connected with such private schools, did not
106 violate the XIV Amendment to the Constitution of the United States, such action of the said King as such health officer being an act of the State of Texas through its Executive Department denying to plaintiff in error the equal protection of the laws.

5. The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas erred in deciding that the Ordinance or Statute of the City of San Antonio, Texas, on its face requiring all children or other persons desiring to attend any of the public schools of said city or any place of education within said city to first present a certificate from some duly qualified physician to the city physician that such child or other person has been successfully vaccinated as a prerequisite to attending such school or place of education, but leaving it to the arbitrary discretion of the Board of Health of said

City to determine when it is necessary for the public health or the health of any such school or place of education that all the teachers, pupils, employés and other persons connected therewith to be vaccinated, and leaving it to the arbitrary discretion of said Board of Health to require such vaccination or not within such period of time and under such regulations as the said Board may deem proper, and inflicting a punishment of a fine of not less than $10.00 nor more than $100.00 for a failure on the part of any person to comply with said determination of said Board of Health and providing that the person so failing to comply may be imprisoned upon failure to pay such fine, is a valid Statute or Ordinance and not repugnant to the XIV Amendment to the Constitution of the United States.

DON A. BLISS,
Attorney for Rosalyn Zucht,
By A. D. ZUCHT,
Next Friend, Plaintiff in Error

106½ [Endorsed:] No. 6428. In the Court of Civil Appeals, Fourth Supreme Judicial District of Texas. Rosalyn Zucht, by A. D. Zucht, Next Friend, Appellant, vs. W. A. King, et al., Appellees. Assignment of Errors. Filed in the Court of Civil Appeals at San Antonio, Texas, May 7, 1921. Jos. Murray, Clerk.

107 In Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

No. 6428.

ROSALYN ZUCHT (by Next Friend), Appellant,

vs.

W. A. KING et al., Appellees.

To the Honorable W. S. Fly, Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas:

Now comes Rosalyn Zucht, who is under the age of 21 years, by A. D. Zucht, her next friend, who was appellant in the foregoing styled cause, petitioner, and represents that:

1. A final judgment was duly entered in the foregoing styled and numbered cause by the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, affirming a final judgment entered by the District Court of Bexar County in and for the 45th Judicial District of Texas in a suit at law and in equity in which the said Rosalyn Zucht by her said next friend A. D. Zucht, was plaintiff, and W. A. King, E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. E. W. McCamish, Mrs. Henry Guerra, Mrs. Dan Leary, Paul Sholz and Marshall Johnson were defendants, sustaining the general demurrers of said defendants to the second amended original petition of the said Rosalyn Zucht by her said

next friend A. D. Zucht, and dismissing the suit and rendering final judgment in favor of said defendants against your petitioner, and awarding costs in favor of the said defendants against your petitioner.

2. The suit was filed in the said district court by petitioner acting by her next friend A. D. Zucht; and, by her bill of complaint in said suit, she averred that she was wrongfully, wilfully and maliciously expelled from the public schools of the City of Antonio in Bexar County, Texas, by the defendants who, in so doing, acted as the officials of said City and claimed to have authority to so do under and by virtue of a certain ordinance or statute of said City enacted by the City Council of said City under the power vested in said City Council by a special Act of the Legislature of Texas to legislate to enforce vaccination in said City; and she further averred that the defendant W. A. King as the Health Officer of said
108 City and as the active manager of the Board of Health of said City wrongfully, wilfully and maliciously compelled the principal of a private school that she was attending after she had been expelled from said public schools to expel her from said private school, by means of a threat that he, the said King, as such Health Officer would close said private school unless petitioner and her brother were expelled therefrom; and she further averred that the said King, in so procuring her expulsion from said private school, claimed to be acting under and by virtue of said ordinance or statute of said City. Petitioner, by her said bill of complaint, brought in question the validity of said ordinance or statute on the ground that the same was repugnant to the XIV Amendment to the Constitution of the United States and, therefore, void. Petitioner, further, by her said bill of complaint, averred that the application and administration of said ordinance or statute of said City by the defendants as the officials of said City were with an evil eye and an unequal hand in that they discriminated against certain persons, including her, by enforcing said ordinance or statute of said City against certain persons, including her, while they knowingly permitted others in precisely like condition and under precisely like circumstances to attend said schools without complying with said ordinance; and she claimed that such application and administration of said ordinance or statute of said City came within the inhibition of the XIV Amendment to the Constitution of the United States. Petitioner, by her said bill of complaint, further averred that by being so expelled from said schools, she had been humiliated and put to shame, and her standing in the community had been injured, besides being deprived of the benefits of the free school fund provided by the State and by the school district, and had been thereby damaged in the sum of ten thousand dollars. And petitioner prayed that judgment be rendered in her favor that she recover of said defendants and of each of them said damages and the costs of the suit; and she further prayed that the defendants and each of them be perpetually enjoined and prohibited from enforcing or attempting to enforce said ordinance or statute of said City against her and that a peremptory writ of mandamus issue compelling the de-

fendants to admit her to attendance upon said public schools of said City; and she also prayed for general relief.

109 3. Though the said Ray Lambert was named as one of the defendants in her said bill of complaint, your petitioner dismissed her suit as to him, he never having been served with process and never having appeared in said suit.

4. General demurrers to the bill of complaint of your petitioner in said suit were sustained by the said District Court of Bexar County, Texas, on January 29th, 1920, and, upon your petitioner's declining to amend, her said suit was dismissed by the said District Court, and final judgment was rendered against her in favor of said defendants and awarding against your petitioner all costs of the suit. Your petitioner duly gave notice of appeal in open court to the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas; and in due time perfected her appeal.

5. On said appeal on, to-wit: October 20th, 1920, said judgment of said District Court was affirmed.

6. Within the time required by law your petitioner filed a motion for a rehearing of said cause in said Court of Civil Appeals, which said motion was on November 17th, 1920, overruled by said Court of Civil Appeals.

7. Within the time required by the laws of Texas your petitioner, acting by her next friend, applied to the Supreme Court of the State of Texas for a writ of error, but said writ of error was refused by the Supreme Court of the State of Texas, on February 9th, 1921; and thereby the said judgment of the said Court of Civil Appeals became final on February 9th, 1921.

8. In all of said courts, your petitioner called in question the validity of said Ordinance or Statute as being repugnant to the 14th Amendment to the Constitution of the United States; and also claimed that the application and administration of said Ordinance by the authorities of said City and State with an evil eye and an unequal hand making an unjust and illegal discrimination against her as hereinbefore stated, thus denying her the equal protection of the laws, came within the inhibition of the XIV Amendment to the Constitution of the United States, yet the decision of said courts was in favor of the validity of said Ordinance or Statute and in favor of the validity of the authority exercised thereunder by the said officers of the said City and of the said San Antonio School Board.

110 9. Your petitioner further avers that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors which is presented and filed herewith.

10. Wherefore, your petitioner prays that writ of error from the Supreme Court of the United States may issue in this cause to the said Honorable Court of Civil Appeals for the Fourth Supreme Ju-

dicial District of Texas for the correction of the errors so complained of and that a transcript of the record, proceedings and papers duly authenticated by the Clerk of said Court of Civil Appeals may be sent to the Supreme Court of the United States as provided by law, and that said judgment be reversed.

Dated at San Antonio, Texas, April 22nd, 1921.

DON A. BLISS,
Attorney of Rosalyn Zucht, Acting by Her Next Friend, A. D. Zucht, Plaintiff in Error.

[Endorsed:] No. 6428. Rosalyn Zucht (by next Friend), Appellant, vs. W. A. King, et al., Appellees. Appellant's Application for a Writ of Error. Filed in the Court of Civil Appeals at San Antonio, Texas, May 7, 1921. Jos. Murray, Clerk.

111 In the Supreme Court of the United States.

No. —.

In Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

No. 6428.

ROSALYN ZUCHT, by A. D. ZUCHT, Next Friend, Appellant,
vs.
W. A. KING et al., Appellees.

On reading of the petition of Rosalyn Zucht, by A. D. Zucht, next friend, for writ of error and the Assignment of Errors, and upon due consideration of the record of said cause;

It is Ordered, That a writ of error be allowed from the Supreme Court of the United States to the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas in the foregoing styled cause as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioner and plaintiff in error, Rosalyn Zucht, by her next friend A. D. Zucht, give security in the sum of One Thousand Dollars that the said plaintiff in error shall prosecute said writ of error to effect and, if said plaintiff in error fail to make said plea good, shall answer to the defendants in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error now presenting a bond in the sum of One Thousand Dollars with —— —— as surety, it is ordered that the same be and hereby is duly approved.

In witness whereof I have hereunto set my hand this 30th day of April, 1921.

W. S. FLY,
Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

111½ [Endorsed:] No. 6428. In the Court of Civial Appeals, Fourth Supreme Judicial District of Texas. Rosalyn Zucht, by A. D. Zucht, Next Friend, Appellant, vs. W. A. King et al., Appellees. Allowance of Writ of Error. Filed in the Court of Civil Appeals at San Antonio, Texas, May 7, 1921. Jos. Murray, Clerk.

112 *Copy of Bond for Writ of Error.*

In Supreme Court of the United States.

No. —.

In Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

No. 6428.

ROSALYN ZUCHT (by Next Friend), Appellant,

vs.

W. A. KING et al., Appellees.

Bond.

Know all men by these presents that I, A. D. Zucht, as next friend of Rosalyn Zucht, as principal and —— —— and —— ——, as sureties, are held and firmly bound unto W. A. King, E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. E. W. McCamish, Mrs. Henry Guerra, Mrs. Dan Leary, Paul Schols and Marshall Johnson, in the sum of One Thousand Dollars to which payment well and truly to be made we bind ourselves jointly and severally by these presents.

Sealed with out seals and dated this 22nd day of April 1921.

A. D. ZUCHT,
As Next Friend of Rosalyn Zucht, Principal.
NATHAN SINKIN,
FERD STAFFEL,
S. SUGARMAN,
Sureties.

Whereas the above named plaintiff in error, A. D. Zucht, as next friend of Rosalyn Zucht, has sued out a writ of error from the Supreme Court of the United States to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas to reverse a judgment of the said Court of Civil Appeals rendered on the 20th day of October, 1920, in the suit entitled Rosalyn Zucht, by next friend, Appellant, vs. W. A. King, et al., Appellees, and numbered 6428 on the docket of said Court of Civil Appeals;

Now, therefore, the condition of this obligation is such that, if the above named plaintiff in error shall prosecute his said writ
113 of error to effect and answer all costs and damages that may be adjudged him if he shall fail to make good his plea, then this obligation is to be void; otherwise, to remain in full force and effect.

A. D. ZUCHT,
As Next Friend of Rosalyn Zucht, Principal.
NATHAN SINKIN,
FERD STAFFEL,
S. SUGARMAN,
Sureties.

Approved this 30 day of April, 1921.

W. S. FLY,
Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

No. 285-12-20-500.

Bond Certificate.

THE STATE OF TEXAS,
County of Bexar:

I, Jack R. Burke, County Clerk in and for said Bexar County, do hereby certify that Nathan Sinkin, Ferd Staffel and S. Sugarman whose names appear signed to the hereto attached bond as sureties are in my opinion fully worth, in their own right, the full amount of the penalty of said bond, and if the same were presented to me for approval in my official capacity, I would approve the same.

Given under my hand and official seal, at office in San Antonio, this 26 day of April, A. D. 1921.

[SEAL.]

JACK R. BURKE,
County Clerk, Bexar County, Texas,
By C. W. TITUS,
Deputy.

Endorsed: No. 6428. In the Court of Civil Appeals, Fourth Supreme Judicial District of Texas. Rosalyn Zucht, by A. D. Zucht, Next Friend, Appellant, vs. W. A. King et al., Appellees. Bond for Writ of Error. Filed in the Court of Civil Appeals at San Antonio, Texas, May 7, 1921. Jos. Murray, Clerk.

114 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or

some of you, being the highest Court of law or equity of the said state in which a decision could be had in the suit styled in said Court, Rosalyn Zucht, by next friend, Appellant, vs. W. A. King, et al., Appellees, between Rosalyn Zucht, by next friend, A. D. Zucht, Appellant, and W. A. King, E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Berreta, Mrs. E. W. McCamish, Mrs. Henry Guerra, Mrs. Dan Leary, Paul Scholz and Marshall Johnson, Appellees, wherein was drawn in question the validity of an authority exercised under said State of its being repugnant to the Constitution of the United States and the decision was in favor of such, its validity, a manifest error hath happened to the great damage of the said Rosalyn Zucht, acting by her next friend A. D. Zucht as by her complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court *of* Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this thirtieth day of April, in the year of Our Lord One Thousand Nine Hundred and Twenty-one.

[The Seal of the U. S. District Court, Western Dist. Texas.]

D. H. HART,
Clerk of the District Court of the United States of America in and for the Western District of Texas,
By T. H. THOMPSON,
Deputy.

[Endorsed:] Filed in the Court of Civil Appeals at San Antonio, Texas, May 7, 1921. Jos. Murray, Clerk.

115 *Certificate of Lodgment.*

Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas.

I, Jos. Murray, Clerk of the said Court, do hereby certify that there was *lodgment* with me as such clerk on May 7, 1921, in the matter of Rosalyn Zucht, by next Friend, vs. W. A. King, et al.:

First. The original bond, of which a copy is herein set forth.

Second. One copy of the writ of error as herein set forth.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office in the City of San Antonio, Texas, this the 9th day of May, A. D., 1921.

[Seal of Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
Clerk Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas.

116 UNITED STATES OF AMERICA, *ss:*

To W. A. King, E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. E. W. McCamish, Mrs. Henry Guerra, Mrs. Dan Leary, Paul Scholz, and Marshall Johnson, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C. within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the office of the Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, wherein Rosalyn Zucht, by her next friend A. D. Zucht, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the hand and seal of the Honorable William S. Fly, Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas this 30th day of April, in the year of Our Lord One Thousand Nine Hundred and Twenty-one.

W. S. FLY,
Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

Attest:

[The Seal of the U. S. District Court, Western Dist. Texas.]

D. H. HART,
Clerk U. S. District Court,
Western District of Texas,
By T. H. THOMPSON,
Deputy.

[Endorsed:] Filed in the Court of Civil Appeals at San Antonio, Texas, May 7, 1921. Jos. Murray, Clerk.

117 In the Supreme Court of the United States.

ROSALYN ZUCHT, by A. D. ZUCHT, Next Friend, Plaintiff in Error,

vs.

W. A. KING et al., Defendants in Error.

W. A. King, E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. E. W. McCamish, Mrs. Henry Guerra, Mrs. Dan Leary, Paul Scholz, and Marshall Johnson, Defendants in Error in the foregoing styled cause, hereby accept service of the citation in error in the foregoing styled cause signed by the Honorable W. S. Fly, Chief Justice of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, on April 30th, 1921.

R. J. McMILLAN &
J. D. DODSON,
Att'ys of Record for W. A. King.
B. W. TEAGARDEN,
For Defdts. Other Than W. A. King.
R. L. BALL,
Attorneys for Defendants in Error.

[Endorsed:] Filed in the Court of Civil Appeals at San Antonio, Texas, May 7, 1921. Jos. Murray, Clerk.

118 *Return to Writ.*

Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas.

In obedience to the commands of the within writ, I hereby transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning the same.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Court of Civil Appeals in the City of San Antonio, Texas, this 9th day of May, A. D., 1921.

[Seal of Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
Clerk Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas.

119 *Authentication of Record.*

Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas.

I, Jos. Murray, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and

all proceedings in the case of Rosalyn Zucht, by next Friend, Appellant, vs. W. A. King, et al., Appellees, and also of the opinion of the Court rendered therein as same now appears on file in my office.

In testimony whereof I hereunto set my hand and affix the seal of said Court in my office in San Antonio, Texas, this the 9th day of May, A. D., 1921.

[Seal of Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
Clerk Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas.

Endorsed on cover: File No. 28,277. Texas Court of Civil Appeals, Fourth Supreme Judicial District. Term No. 326. Rosalyn Zucht, by her next friend, A. D. Zucht, plaintiff in error, vs. W. A. King et al. Filed May 23d, 1921. File No. 28,277.

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No. 326.

OCTOBER TERM, 1921.

FILE No. 28,277.

IN THE Supreme Court of the United States

ROSALYN ZUCHT, *by A. D. Zucht, Next Friend,*
Plaintiff in Error

vs.

W. A. KING, *et al.*
Defendants in Error

STATEMENT OF THE CASE, SHOWING THE QUESTIONS OF LAW AND HOW THEY AROSE.

Rosalyn Zucht, by A. D. Zucht, her next friend, brought suit in the District Court of Bexar County in and for the 45th Judicial District of Texas, against W. A. King, E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. E. W. McCamish, Mrs. Henry Guerra, Mrs. Dan Leary, Paul Scholz and Marshall Johnson, alleging that the city of San Antonio in Bexar County, Texas, was a city duly incorporated by special act of the legislature of Texas as a city having over 10,000 inhabitants with territorial limits six miles square and having over

100,000 inhabitants; that the San Antonio Independent School District was also incorporated by special act of the Legislature of said State having the same territorial limits and that its affairs were controlled by a special body of officers called the San Antonio School Board. She further alleged that, by the terms of said special act incorporating said city, the City Council thereof was empowered to make all ordinances and regulations to enforce vaccination and that no other power as to vaccination except this general power was conferred upon said City Council by the terms of said act. She further alleged that the exclusive control and management of the public free schools within said city were conferred upon the San Antonio School Board and that said City of San Antonio had no power or control whatever over said schools.

She further alleged that no power whatever was conferred upon the said San Antonio Independent School District or the said San Antonio School Board, which managed the affairs of said San Antonio Independent School District, with reference to vaccination either in express terms or by necessary implication.

She further alleged that, by the terms of said special act creating the said San Antonio Independent School District and the San Antonio School Board, all persons between the ages of seven years and twenty-one years had the right to attend the public free schools in said District and receive instruction therein and were entitled to all the benefits of the public free school fund furnished by the State and the public free school fund derived from taxation in said District for free school purposes, said San Antonio School Board being authorized and empowered by the terms of said special act creating said Independent School District to levy taxes on all the prop-

erty in said District subject to taxation, for the purposes of acquiring grounds for public free school buildings, constructing school buildings thereon and equipping the same and for maintaining public free schools in said District during nine months of each and every year; and she further alleged that said School Board had exercised said powers for many years and had levied taxes and collected the same for said purposes and was still so doing.

She further alleged that the grounds and buildings of said public free schools in said District were in excellent sanitary condition and were kept so all the time; and that all of said buildings were provided with separate individual seats on which the pupils and other persons connected with said schools were seated separate and apart from each other so that said pupils and other persons were not in personal contact. She further alleged that every reasonable precaution was taken to protect the health of the pupils attending said public schools.

She further alleged that said City of San Antonio had a street car system operating on and over its principal streets, transporting passengers on its cars during each and every day and during the greater part of each and every night, which cars had seats where the passengers, consisting of men, women and children, were seated in closest juxtaposition and that said cars were daily and nightly crowded with passengers to such an extent frequently there was hardly standing room in said cars, the passengers being almost literally packed in said cars; that said city also had a great number of theaters and other buildings where public shows were daily and nightly conducted, where great crowds of men, women and children gathered daily and nightly for entertainment, and were seated in closest personal contact; that said city had a great number of churches where crowds of people

consisting of men, women and children were in close personal contact at least once a week and frequently oftener; that said city also had within its limits quite a number of railway passenger depots where large crowds of people, consisting of men, women and children assembled in close personal contact daily and nightly; that there was also in said city a motor car service, operating on a number of the principal streets, daily and nightly, transporting passengers consisting of men, women and children, in the closest personal contact, such passengers frequently sitting in each other's laps; that there were also in said city a large number of factories where great number of men, women and children were employed in close personal contact with each other every day of the week except Sunday; that there were in said city a great number of laundries where a great number of men, boys and girls were employed, working daily in close personal contact; that there was also in said city what is called the Mexican Quarter, where the sanitary conditions are not good and where approximately twenty thousand inhabitants of the said city reside closely crowded and where large crowds assemble in close personal contact daily and frequently at night; that said city had a large number of public parks where crowds of men, women and children gather frequently for recreation and there were bathing pools where great crowds of men, women and children bathe daily and nightly during the summer season; that on the principal streets of said city there were great crowds of people on the sidewalks daily and nightly in close personal contact, frequently amounting to jams; that there were and had been for many years in said city a large number of private schools and institutions of education where great numbers of pupils both under the age of twenty-one years and over the age of twenty-one years constantly attended and had attended

and were taught and had been taught in various branches of learning and skill, and that there were and had been all the time many other persons employed and connected with and attendant upon said private institutions of education; and that there were a great number of public free school buildings where great numbers of pupils between the ages of seven years and twenty-one years attended and received instruction and a great number of other persons were employed in and connected with said public free schools.

She further alleged that the said City of San Antonio and its said City Council had never attempted to enforce vaccination generally among the inhabitants of said city nor even among the children generally of said city, but undertook to arbitrarily discriminate against the pupils who attended the schools and educational institutions in said city and the persons connected with said schools and educational institutions in said city by an ordinance, the terms of which she set forth verbatim in her petition. The substance of this ordinance was that, whenever in the opinion of the Board of Health of said city, it was necessary for the public health, or the health of any place or institution of education, that all the teachers, pupils, employes and other persons connected with such place or institution of education, should be vaccinated, the said Board of Health might require such vaccination within such period of time and under such regulations as said Board of Health might require, and prohibited any child or other person attending any such place or institution of education within the city, without having been successfully vaccinated within six years preceding the time, and presenting a certificate to such effect from some duly qualified physician; and made it a misdemeanor for any person to send or attempt to send a child to any such school or place of education within the city without hav-

ing such child vaccinated in accordance with the provisions of the ordinance punishable by a fine not less than Ten Dollars and not more than One Hundred Dollars for each day such offense should continue, and providing that, upon failure to pay such fine, such person might be imprisoned in the city jail not less than ten days nor more than thirty days; and also making it a misdemeanor for any person to admit any such child or other person to attendance to such school or other place of education without such certificate of vaccination punishable in the same manner.

The said Rosalyn Zucht further alleged that the penal provisions of said ordinance prescribing a fine and imprisonment never had been enforced in said city and that there had not been the slightest attempt to enforce the same during the time that had elapsel since the adoption of said ordinance; and that many pupils and others had been continuously attending the public and private schools, places and institutions of education, public and private, in said city without ever having been vaccinated and without ever having presented any certificate of vaccination as required by the terms of said ordinance and this with the full knowledge of the authorities of said city and of the said Independent School District.

She further alleged that said ordinace was not, and was not intended to be a mere temporary measure, to be in force only when there was an epidemic of smallpox in said city or when such an epidemic was imminent, but purported to be in force and was intended to be in force all the time whether or not there was a single case of smallpox in said city, in the county or even in the State. She further alleged that the said San Antonio Independent School District and the said San Antonio School Board had no rule with reference to vaccination.

She further alleged that no reason existed for the said discrimination against the pupils and persons attending the schools and educational institutions in the said city, but that, on the contrary, there was much more danger of the contagion of smallpox spreading from the close personal contact of persons in the said assemblages and in the places other than in the schools and educational institutions in said city than from the contact of the pupils, teachers, employes and other persons connected with the schools and other educational institutions in said city; and that, in the Mexican Quarter, especially, the danger of the disease breaking out and spreading was infinitely greater than in said schools and educational institutions in said city.

She further alleged that she was of the age of fifteen years and was entitled to attend the public free schools in said city and Independent School District and to receive her part of the benefits of the public free school fund provided under the laws and Constitution of the State of Texas, including the fund produced by said special tax in said district and that she had been attending said public free schools during the past year and during the months of January and February of the year 1919, the school that she had been attending being known as the Brackenridge High School in said Independent School District.

She further alleged that she had never been vaccinated nor was she or were her parents willing that she should submit to vaccination, because she and her parents feared that vaccination would endanger her health and life; that a large number of other pupils who had not been vaccinated, and had furnished no certificate of vaccination, were attending said school and other public free schools in said district during the time that she was attending

said school, and that they were knowingly permitted by said officers to continue attending said school without having been vaccinated and without having furnished certificates of vaccination after she was expelled from said school in the manner set forth in her petition, though they were in precisely the same condition and circumstances that she was in; that she and her parents had a permanent home and resided in a locality in said city where there never had been a case of smallpox, and they had continuously resided in the same locality for many years; that she had never been exposed to the contagion of smallpox, and that the sanitary conditions in said locality where she and her parents had their home were excellent, being a quiet residence portion of said city where the inhabitants owned their own homes and there was no crowding of houses close together and no crowds gathered on the streets or elsewhere in said locality.

She further alleged that there was no epidemic of smallpox in said city at the time, nor had there been such an epidemic in said city for more than ten years; that there was no such epidemic imminent at the time, nor was such an epidemic imminent at the time she was expelled from school, and that there had been no case of smallpox in said school that she was attending.

Yet, she further alleged that, on March 3rd, 1919, the defendants named in her petition, acting as the officials of said city, conspired together to expel her from said school, and said defendants and each of them, acting wantonly and maliciously, expelled her from said school, and that the said defendants and each of them, acting wantonly and maliciously, refused to permit her to attend said school any longer and prevented her from attending any other public school in said city unless she would submit to vaccination, and that thereby said

defendants and each of them deprived her of the benefits of an education and of the benefits of her proportionate part of said public free fund provided by the Constitution and the laws of Texas.

She alleged that the defendant, W. A. King, was the public health officer, city physician and the active manager of the Board of Health of said city; that the defendants, E. O. Evans, Charles Gerlach, Guy S. McFarland, J. K. Beretta, Mrs. Dan Leary, Mrs. Henry Guerra and Mrs. E. W. McCamish, were members of and constituted the San Antonio School Board, having the exclusive control and management of the public free schools in said San Antonio Independent School District; that the said Paul Scholz was the business agent of said San Antonio School Board; and that the said Marshall Johnson was the principal having charge and control of the said public free school that she had been attending and from which she was expelled.

She further alleged that, by the terms of said special act of the Legislature incorporating the said city of San Antonio as a municipal corporation, all the legislative powers and authority delegated to said municipal corporation by said special act were vested in said City Council of said city composed of Commissioners, and that no Legislative powers or authority whatever were by the terms of said act vested in said Board of Halth; and she further alleged that the members of said City Council had no power or authority to delegate their Legislative power or authority to said Board of Health, or to any one else.

She alleged that, by reason of having been expelled from said public free school and by reason of being refused permission to attend any of the public free schools in said city, she had been humiliated and put

to shame and that her standing in the community had been injured; and [redacted] she sought to recover of the defendants in her suit and of each of them the sum of $10,000.00 as damages, for a writ of mandamas compelling the defendants named in her petition to readmit her to attendance in said public school; and she also prayed for general relief.

She, through her next friend, claimed in her petition that said ordinance violated the XIV Amendment of the Constitution of the United States and was, therefore, void. The respects in which she claimed in her said petition that said ordinance violated the XIV Amendment to the Constitution of the United States, were:

First: That said ordinance undertook to leave it to the arbitrary discretion of the Board of Health of said city to determine whether or not it was necessary for the public health of said city or for the public health of any place or institution of education in said city for all the teachers, pupils, employes or other persons connected with said place or institution of education should be vaccinated, and undertook to clothe said Board of Health with power to require such vaccination within such period of time and under such regulations as such Board might require, without laying down any rules by which the impartial execution of said ordinance might be secured or by which partiality and oppression in its execution could be prevented.

Second: That said ordinance laid burdens in the way of vaccination, penalties and imprisonment, upon some persons, inhabitants of said city, and left the other inhabitants of said city in like conditions and under like circumstances (and even worse) free from such burdens.

She further claimed in her said petition, through her said next friend, that even if the said ordinance had

been fair on its face and impartial in appearance, yet since it was applied and administered by the defendants in the suit, acting as public authorities of said city, with an evil eye and an unequal hand so as to practically make unjust and illegal discrimination in similar circumstances and thereby d e n i e d her equal justice, the said public authorities of the said city, came within the [redacted] inhibition of the XIV Amendment to the Constitution of the United States in that said application and administration of said ordinance by the defendants in said suit denied to her the equal protection of the laws. (Record, pp. 1-10.)

A general demurrer was urged by all the defendants in the suit to her said petition; said general demurrer was sustained by the trial court; and, upon her declining to amend through her next friend, her said suit was dismissed. (Record, pp. 12, 21, 25.)

She, through her next friend, duly prosecuted an appeal from the judgment of said trial court to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas; and she properly presented and urged assignments of error in said Court of Civil Appeals, presenting the foregoing Federal questions, to-wit: "That the ordinance of said city violated the XIV Amendment of the Constitution of the United States in the respects hereinbefore set forth; and that the application and administration of said ordinance by the defendants in her suit as public authorities of said city as set forth in her petition denied her the equal protection of the laws. (Record, pp. 26-40.)

The said Court of Civil Apeals affirmed the judgment of the trial court; and, then, within due time, she, through her said next friend, duly presented to the Supreme

Court of the State of Texas, her application for a writ of error, in which application, by proper assignments of error, she urged that said ordinance of said city violated the XIV Amendment to the Constitution of the United States in the respects hereinbefore set forth, and was, therefore, void; and also that the application and administration of said ordinance by the said defendants in her suit, acting as the public authorities of said city, in expelling her and her brother from the public schools of said city because she and her brother would not submit to vaccination, while the defendants in the suit knowingly permitted a great number of other pupils who had not been vaccinated, yet who were in precisely the same circumstances and conditions as she and her brother, to continue to attend the same public schools without being vaccinated, and in driving her and her brother away from the private school that they were attending after they were expelled from said public school because they would not submit to vaccination when there had never been any pretense of enforcing said ordinance as to the private schools and institutions of education in said city; and in not even attempting to enforce said ordinance as to the other pupils in said private schools and other private institutions of education in said city, deprived her of the equal protection of the laws within the inhibition of the XIV Amendment to the Constitution of the United States. (Record, pp. 40 and 47-73.)

The Supreme Court of the State of Texas promptly refused her application for the writ of error. (Record p. 74.)

The Honorable W. S. Fly, the Chief Justice of the said Court of Civil Appeals, has duly and within the time allowed by law, granted to Rosalyn Zucht, acting through her next friend, a writ of error from this, the

Supreme Court of the United States, to the said Court of Civil Appeals in said cause. (Record p. 80.)

ASSIGNMENT OF ERRORS.

1: The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas erred in holding that the Ordinance or Statute of the City of San Antonio, Texas, in putting those who attend the schools and other educational institutions in said city and those connected therewith in a class against whom vaccination is to be enforced and leaving other persons in said city free from such a burden in precisely the same condition and under precisely the same circumstances as the persons attending said schools and educational institutions and persons connected therewith, does not violate the XIV Amendment to the Constitution of the United States.

2: The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas erred in deciding that the Ordinance or Statute of the said City of San Antonio, Texas, is not repugnant to the XIV Amendment to the Constitution of the United States in leaving it to the arbitrary discretion of the Board of Health of said city to determine whether it is necessary for the public health of any place or institution of education in said city that all teachers, pupils, employes or other or other persons connected therewith be vaccinated and in undertaking to clothe said Board of Health with power to require said vaccination within such period of time and under such regulations as such Board of Health may require, without laying down any rule by which the impartial execution of the power vested in said Board can be secured, or partiality and oppreseion can be prevented.

3: The Court of Civil Appeals for the Fourth

Supreme Judicial District of Texas erred in deciding that the application and administration of said Ordinance or Statute of the said City of San Antonio, Texas, by the defendants in error as the authorities of said city in expelling Plaintiff in Error from the public schools of said city because she would not submit to vaccination and her parents would not permit her to be vaccinated because of a belief on her part and their part that vaccination would endanger her health and life, while the Defendants in Error knowingly permitted many other pupils to continue attending said public schools without being vaccinated and without in any way complying with Ordinance of said city, though such others were in precisely the same condition and were under precisely the same circumstances as Plaintiff in Error, and in thus administering said Ordinance or Statute of said city as such officials with an evil eye and an unequal hand, do not come within the inhibition of the XIV Amendment to the Constitution of the United States.

4: The Court of Civil Appeals for the Fourth SupremeJudicial District of Texas erred in deciding that the action of the defendant, W. A. King, as the health officer of said city, professing to act under the authority of said Ordinance or Statute of said city, in compelling the principal of the private school which Plaintiff in Error and her brother, Arthur Zucht, were attending after they had been expelled from the public schools of said city as aforesaid to expel Plaintiff in Error and her said brother from said private school on account of their refusal to submit to vaccination for the reasons aforesaid when the said King knowingly permitted the other pupils attending said private school to continue their attendance upon such school without being vaccinated and without complying with said Ordinance or

Statute of said city in any way, though said other pupils so attending said private school were in precisely the same condition and under precisely the same circumstances as those that Plaintiff in Error and her said brother were in, and when there never had been any pretense of enforcing said Ordinance or Statute of said city as to the pupiis attending private schools in said city or as to other persons connected with such private schools, did not violate the XIV Amendment to the Constitution of the United States, such action of the said King as such health officer being an act of the State of Texas through its Executive Department denying to Plaintiff in Error the equal protection of the laws.

5: The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas erred in deciding that the Ordinance or Statute of the City of San Antonio, Texas, on its face requiring all children or other persons desiring to attend any of the public schools of said city or any place of education within said city to first present a certificate from some duly qualified physician to the city physician that such child or other person has been successfully vaccinated as a prerequisite to attending such school or place of education, but leaving it to the arbitrary discretion of the Board of Health of said city to determine when it is necessary for the public health or the health of any such school or place of education that all the teachers, pupils, employes and other persons connected therewith to be vaccinated, and leaving it to the arbitrary discretion of said Board of Health to require such vaccination or not within such period of time and under such regulations as the said Board may deem proper, and inflicting a punishment of a fine of not less than $10.00 nor more than $100.00 for a failure on the part of any person to comply with said determination of said Board of Health, and pro-

viding that the person so failing to comply may be imprisoned upon failure to pay such fine, is a valid Statute or Ordinance and not repugnant to the XIV Amendment to the Constitution of the United States. (Record, pp. 75-77.)

BRIEF OF THE ARGUMENT.

JURISDICTION.

This Court has heretofore held that the ordinances of a municipal corporation in a State are Statutes of such State within the meaning of the judiciary acts, and that, therefore, a writ of error lies from this Court to the highest Court in the State in which a decision in the suit could be had "where is drawn in question the validity of a Statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, Treaties or laws of the United States, and the decision is in favor of their validity". (Home Insurance Company, vs. Augusta, Ga., 93 U. S. 116; 23 Law Ed. 825.)

Therefore, it is clear that this Court has jurisdiction of this case. For the validity of an ordinance enacted by the City Council of the City of San Antonio under the authority of the State of Texas on the subject of vaccination was drawn in question by Rosalyn Zucht, through her next friend, on the ground of its being repugnant to the XIV Amendment of the United States, and the highest court of the State was in favor of the validity of such Ordinance. She also drew in question the validity of the exercise of the authority by the officials of said city on the ground that the application and administration of said Ordinance by the said city officials was with an evil eye and an unequal hand in discriminating against her and and her brother by expelling her and her brother from the public free schools

of said city because they would not submit to vaccination when a great number of other pupils under precisely the same conditions and precisely the same circumstances who had not been vaccinated, were knowingly permitted by said city officials to continue to attend said public free schools without requiring them to be vaccinated, and by causing her and her brother to be expelled from a private school in said city, which they were attending after being expelled from the public schools, when there was not and had not been even a pretense of requiring the other pupils attending the private schools in said city to be vaccinated, though these other pupils so attending said private schools were in precisely the same circumstances and under precisely the same conditions as she and her brother; and that this was a violation of the XIV Amendment to the Constitution of the United States.

We respectfully submit the following propositions and authorities, to-wit:

FIRST PROPOSITION.

Since the Ordinance of the City of San Antonio relative to vaccination undertakes to leave it to the arbitrary discretion of the Board of Health of said city to determine whether it is necessary in the opinion of said Board of Health for the public health of said city or of the public health of any place or institution of education in said city that all the teachers, pupils, employes, or other persons connected therewith be vaccinated; and undertakes to clothe said Board with power to require such vaccination within such period of time and under such regulations as said Board of Health may require, without laying down any rules by which its impartial execution can be secured or partiality and oppression can be prevented, said Ordinance violates the XIV Amend-

ment to the Constitution of the United States, and is absolutely void.

STATEMENT

The Ordinance on its face requires all persons attending upon or connected in any way with the schools and institutions of education within said city to be vaccinated or to present certificates of previous vaccination as a condition precedent to their being allowed to attend upon or be connected with such schools of institutions of education. But the Ordinance leaves it to the City Board of Health to determine when and under what circumstances this Ordinance is to be enforced and as to what particular institution of education it shall be enforced, without laying down rules by which said Board of Health are to be guided as to putting the Ordinance in force. (Record, pp. 4-6.)

AUTHORITIES.

Baltimore vs. Radeck, 49 Md., 217.
Ex Parte Sing Lee, 24 L. R. A., 196.
Cicero Lumber Co. vs. Cicero, 42 L. R. A., 589.
City of Richmond vs. Dudley, 13 L. R. A., 589.
Sioux Falls vs. Kirby, 25 L. R. A. 623.
State vs. Tenant, 15 L. R. A., 424.

SECOND PROPOSITION.

Since the Ordinance of the City of San Antonio undertakes to enforce vaccination against only the persons attending upon and connected with the schools and other institutions of education in said city, it discriminates against such persons and lays burdens upon them not laid upon other persons under like conditions and under like circumstances; and, therefore, said Ordinance vio-

lates the XIV Amendment to the Constitution of the Uuited States.

Statement

While the power conferred by the charter of the City of San Antonio as a municipal corporation authorized its City Council to enforce vaccination, no authority was conferred upon it to discriminate in the enforcement of vaccination. The Ordinance, which is the only Ordinance adopted by the city with reference to vaccination, undertakes to enforce vaccination only against persons attending upon or connected with the schools and other institutions of education within the city, and does not undertake to enforce vaccination generally. (Record, pp. 3 and 4-6.)

Authorities.

Yick Wo vs. Hopkins, 118 U. S. 220; 30 Law Edi. 220.
Chicago &c. Ry. Co. vs. Chicago, 116 U. S. 234; 41 Law. Ed., 984.
Johnson vs. St. Paul, &c. Co., 8 L. R. A., 419, (Minn.)
State vs. Garbroski, 56 L. R. A.,570, (Iowa)
Sutton vs. State, 33 L. R. A., 589; 36 S. W., 697, (Tex.)
G. C. & S. F. Ry. Co. vs. Ellis, 165 U. S., 150;41 Law Ed 666.
State vs. Loomis, 21 L. R. A.,789, (Mo.)
State vs. Haun, 47 L. R. A., 369, (Kansas)
State vs. Goodwill, 6 L. R. A., 621, (West Va.)
Ex Parte Leo Jentzsch, 32 L. R. A., 664, (Cal.)
Evansville vs. State, 4 L. R. A., p. 97, (Ind.)
Louthan vs. Commonwealth, 52 Am. Rep., 626 (Va.)
Attorney General vs. Detroit, 55 Am. Rep., 675 (Mich.)
Van Harlingen vs. Dowle, 54 L. R. A., 771, (Cal.)
Off vs. Morehead, 20 L. R. A., (N. S.), 167.
People vs. Wilber, 27 L. R. A., (N. S.), 357.

Low vs. Rees Print Co., 24 L. R. A., 702.
Dibrell vs. Lanier, 12 L. R. A., 70; 15 S. W., 87.

THIRD PROPOSITION.

Even if the Ordinance of the City of San Antonio relative to vaccination itself had been fair on its face and impartial in appearance, yet, since it was and is applied and administered by the City Officials of said city with an evil eye and an unequal hand so as to make an unjust and illegal discrimination between Rosalyn Zucht and other pupils in the schools of said city in similar circumstances material to their rights, the denial of equal justice to the said Rosalyn Zucht in expelling her from said schools because she was not vaccinated, while other pupils under precisely the same circumstances were knowingly permitted by said City Officials to continue to attend said schools without being vaccinated, was and is within the inhibition of the XIV Amendment to the Constitution of the United States in that the said Rosalyn Zncht was and is thereby deprived of the equal protection of the laws.

AUTHORITIES.

Yick Wo. vs. Hopkins, 118 U. S., 356, 30 Law Edi., 220.
Scott vs. McNeal, 154 U. S., 34; (38 Law Edi., 896.)
Ex Parte Virginia, 100 U. S., 339; (25 Law Edi., 676.)
Carter vs. Texas, 177 U. S., 442; (44 Law Edi., 839.)
Smith vs. State, 58 S. W., 97.

DISCUSSION.

History shows that civilization has never gone backward permanently, taking the world as a whole, but undoubtedly, it has swung like a pendulum back and forth in the different countries in the course of the ages. For example, its light was dimmed in Europe during the Mid-

dle Ages when ignorance, superstition, fanaticism and cruelty spread their pall over that continent. And, strange to say, the fairest countries, where once the light shone brightest, have been the latest to emerge from the darkness. Greece, where once this light was most glorious, is just now coming out from the cloud of semi-barbarism, Spain, which at one time had the most enlightened institutions in the world, is now a backward country. Mesopotamia and Egypt, the centers of ancient civilization, have not yet escaped from the darkness caused by the Turkish conquest.

And this is true as to all the phases of civilization, including jurisprudence. There can be no doubt that individuals existed for thousands and thousands of years before the organization we now call society appeared, and, during that entire time, each individual must have done "that which was right in his own eyes." When society was first formed, it was believed that it could not continue to exist unless the rights of individuals were restricted; and as progress was made, these rights of individuals were more and more restricted until, in some countries, the most highly civilized at the time, such as Egypt and Babylonia, the individual was swallowed up in the State. That is to say, it was considered that the individual had no rights except such as the State conceded to him. Even in the states of ancient Greece, where individualism was much more pronounced than in other civilized countries, the citizen held his life, his liberty, and his property at the arbitrary will of the State. The probity, ability and patriotism of even Aristides the Just could not shield him against confiscation of his property and ostracism from his native land though he had never committed a single wrong against his fellowman. The ancient Romans, who developed a system of justice between man and man, which still holds sway throughout

the civilized world and which can never be surpassed, allowed individuals to be merged into that artificial being called the State, until they became nothing but slaves to the State.

This extreme centralization had its natural effect on those ancient societies, which was decay and finally death.

The Feudal System, which succeeded, was to a great extent a return to individualism, but it was an individalism where "might made right." Under this system, each individual seemed to think that he was the only individual that had any rights and that no other individual had any rights that he was bound to respect. From the resulting anarchy, the peoples of Europe sought refuge in despotism again. But, in one country, a long struggle continued between the State, represented by the king, and the people as individuals. Magna Carta was one Bill of Rights wrung by the people from the State, represented by the king. The famous Bill of Rights adopted by Parliament in 1689, embodying the fundamental principles of political liberty as understood in England at the time, marked a memorable epoch in the development of individual liberty. But still even in England, the idea had never taken root that an individual has rights that his government, no matter what might be its form, must respect. While the powers of the king were hedged by the Bill of Rights, yet Parliament was still considered supreme, and any law enacted by it, no matter how unjust, unreasonable or tyrannical, was considered the "law of the land". In other words, while the king had to respect certain rights set forth in the famous Declaration of Right, the individual had no rights that Parliament was bound to respect.

It was not 'till the bell pealed forth in Philadelphia on

the 4th day of July, 1776, that the announcement was made to the civilized world that individuals, as such, had *inalienable* rights, that is to say, rights that no government, whatever may be its form, can take away, nay even, that the individual himself cannot deprive himself of except by committing crime against his fellow man. It was declared that, among these *inalienable* rights, are the right to live, the right of liberty and the right to the pursuit of happiness. It was declared that governments were instituted among men to *preserve* these rights and not to *destroy* them.

This Declaration ushered in the era of Constitutional government, that it to say, a government whose powers are defined and limited so as to prevent it from encroaching upon the inalienable rights of individuals. It was thought that the rights of individuals would be protected under this form of government.

But, alas, we had inherited our jurisprudence from England, declared by a long series of precedents extending through a long period, while individual rights as against the King and Parliament were not recognized. It could hardly be expected that our courts would not be controlled to a great extent by these precedents. Hence, our courts have too often tended in their decisions to minimize the rights of individuals as against the State. .

Provisions in our Constitutions, State and National, designed to protect individual rights as against the government, have been frequently given a very narrow construction, and have sometimes been so whittled down as to practically destroy them. Especially has this been the tendency since the close of the Civil war

Just so the object of the law seems to be good and that the good of the majority may be promoted thereby, the

the courts have no difficulty in construing away the provisions of constitutions designed to protect individual rights and in exalting the powers of the State. They seem to forget the physical law, that, in order for the entire physical body to be healthy and in full vigor, each cell composing the body must be kept perfect and in full vigor. They do not realize that the destruction or impairment of a single cell of the human body to that extent impairs the health and vigor of the entire body. They forget that the social body is just like the physical body and that the greatest good to the social body depends upon the preservation of the individual in all his rights.

The proposition, that the rights of individuals must yield to the general good, is fundamentally vicious as anyone will see by undertaking to carry it to its logical conclusion. Thus, it would be undoubtedly for the general good that no poverty should exist in the land. But it does not follow by any manner of means that a law should be enacted by the State compelling individuals who have property to divide with those that have none. In the plan of the redemption of mankind from the penalties of sin, it may have been expedient that one man's life should be sacrificed for the good of all, but this cannot be accepted as sound in jurisprudence. The individual selected to be sacrificed in such a case, would be sure to protest against the injustice. The taking of one man's property or liberty or life, except for the commission of crime, for the benefit of others, cannot be justified by any principle of jurisprudence. Likewise, society cannot be justified in sacrificing the individual rights of any man for the general good. If it is a right, then it is the individual's own, and the whole world has no right to take that right away from him without his consent.

It must be confessed that the modern tendency seems to be toward Socialism. Even the courts are being influenced by this tendency. But, in the judgment of the writer, this is going back thousands of years instead of being a step forward in the progress of civilization.

It is frequently urged by those who still believe in the ancient system handed down to us from Babylon, Assyria, Sparta and Rome, the fundamental principle of which is that the individual belongs to society and has only such rights as society chooses to concede to him, that those who promulgated the declaration, that the individual has inalienable rights, could not have meant what they said, for the reason that, at the very time they announced this declaration, a war was raging between the mother country and the American colonies; and that in a state of war, society may demand of the individual the sacrifice of, not only his property and liberty, but even his life for the general safety.

The writer submits that this is not a valid objection to the proposition that an individual has inalienable rights. War frequently disregards all rights. In a certain sense it must be conceded that one individual has the right to take even the life of another to save his own. And what is true of one individual is true of the collection of individuals called society. When one set of individuals seek to deprive another set of individuals of their property, their liberty and their lives, the set attacked have the undoubted right to protect themselves. When the property, liberty and lives of the individuals composing one society are attacked by those composing another, it is the duty of every individual of the society attacked to defend himself and his family against robbery, slavery and death. And the society of which he is a member deprives him of no right when it compels him to discharge his duty. Thus, when Germany, dis-

regarding the sacred obligation of its own solemn treaty and every moral principle, hurled its hordes of invaders upon Belgium, it became the duty of every Belgian able to bear arms to resist to the death, and the Belgian government deprived no individual Belgian of any right when it required him to perform his duty

But did the military autocrats of Germany have the right to require of the poor German individual to tear himself from his family and sacrifice his all, even his life, to help rob and enslave the Belgians who had done him no wrong?

The case where an infectious or contagious disease is sweeping over the land, destroying thousands of lives, is almost, if not precisely, the same as a state of war. Under such circumstances, it is a duty that the individual owes to himself and family to protect himself and them, if he can, against the threatened danger; and society deprives him of no right when it compels him to perform this duty.

Hence, organized society, acting through its agencies, has the right to take such measures as it may deem best for protection. The measures taken for such purpose may not, in the light of subsequent events, have been the best. But mistakes may be made in strategy even in a case of war for self-preservation. There must be an arbiter or tribunal to judge of and determine what are the best measures for protection. Otherwise, organized society would be unable to act at all with any efficiency.

But the mere fact, that a possible danger of a future aggression may exist, does not justify any society in depriving the individuals of their liberties and in building up a military despotism. Neither does a possible future danger of an epidemic of a contagious or an in-

fectious disease justify any government in permanently quarantining its citizens against the whole outside world and in shutting them up by prison walls.

The proposition, that the persons or bodies of individuals are absolutely sacred against the demands of organized society, cannot be sucessfully maintained. It has already been shown that, where the public safety absolutely requires it, society has a right to demand of the individual the risk of his life even, in defense of himself, his family and the society of which he is a member. But the emergency must actually exist before such a demand can justifiably be made.

The mere fact, that the object or purpose had in view is a good one, cannot be a justification for society's depriving the individual of his rights. There never has been an encroachment upon the rights of the individual by a government that did not have some ostensible good purpose in view. If there be an existence beyond this life where the condition of each individual must be either one of eternal suffering or eternal felicity, it is of the utmost importance to all that such measures may be taken as may insure the eternal happiness of each individual beyond the grave. The theologians in the older days had figured out exactly and professed to know precisely what measures should be taken to insure this. The adoption of a certain creed was considered by them as absolutely necessary for the spiritual health of the individual in this world, as well as for his eternal well being in the next. If this view was correct, then the spread of heresy was infinitely worse than the spread of any contagious disease. For a contagious disease could affect men only temporarily, whereas a heresy would determine their eternal misery. The vast majority in certain organized societies, such as that of Spain, had no

doubt of the correctness of this view. And they acted logically when they established the Inquisition and proceeded to burn all individuals that were affected with heresy in religious opinions. Of course, there were many individuals in this society who protested that a matter of this kind could not be a matter of absolute knowledge, and that, therefore, society could not be justified in adopting the *auto-da-fe* as a protection to society against possible eternal ills. There was also a time in the history of most European countries when those that denied the divine right of kings met the same fate, and this too with the approval of a great majority of the individuals composing the particular society.

No one now thinks of attempting to justify these things. The great masses of civilized mankind now agree that, as to matters beyond this life, we cannot have positive knowledge; and the doctrine, that certain men were appointed by the Almighty to govern their fellow men, has long since been exploded.

Science has undoubtedly made great progress in the department of physical health; but it must be confessed that, as to many matters connected with physical health, we have no absolute knowledge. Therapy is still largely empirical. Certain things in this department of medicine we know absolutely. One is that the chlorides of mercury and carbolic acid are germicides. Another is that quinine is a specific for chills caused by malaria. We also know absolutely that the mosquito called "Stegomyia Fasciata" conveys the infection of yellow fever from one person to another, and that the mosquito called "Anopheles" conveys the infection of malaria from one person to another; and we know that, if the Stegomyia is absolutely destroyed, we will have no more yellow fever; and the same result will follow with reference to malaria by the extermination of the Anopheles. So,

society is justified in isolating the individual afflicted with yellow fever and in so screening him that no mosquitoes can reach him to convey the infection from him to another.

And, though the means by which the disease of smallpox is communicated from one person to another is still unknown, we do know that, if the smallpox patient is isolated and all those that have been exposed to the contagion are also isolated, the danger of the spread of the disease is warded off. Hence society is justified in quarantining, imprisoning, so to speak, those afflicted with smallpox and those that have been exposed to the contagion until the danger is past. By such imprisonment, the individual is deprived of no right.

But, as to whether the spread of smallpox can be prevented by the use of any drug or by the introduction into the human body of any other substance, is a matter as to which we have no absolute knowledge. If we had any such absolute knowledge, the courts would judicially know of this; but the courts are all agreed that they cannot and will not undertake to determine that vaccination is a preventive of the spread of smallpox. All that the courts can say is that the great majority of the medical profession and probably the majority of civilized mankind *believe* that vaccination is such a preventive. (Viemeister vs. White, 179 N. Y., 235; 72 N. E., 97; 70 L. R. A.,796; State vs. Board of Education, 76 Ohio St., 297; 81 N. E., 568; Jacobson vs. Massachusetts, 197 U. S., 11.)

A belief that a certain thing is true, even though such belief may be practically unanimous and may be entertained for centuries, is no proof that such belief is correct. The Ptolemaic theory of the Solar System was

universally accepted among the learned as correct for more than three hundred years and until it was exploded by Galileo and Copernicus. Smoke smudges were regarded during the middle ages as the specific for combatting the ravages of the plague. Likewise, for hundreds of years, bleeding was the universal panacea of the medical profession for all bodily ills. We know now that one might just as well undertake to fertilize a forty acre field by blowing gas through the cracks in the fence, as to undertake to combat the spread of the bubonic plague by smoke smudges. And we also now know that, when a patient needs all of his vitality to resist a disease, bleeding is death. The great majority of the medical profession in those ancient days were just as cocksure of the efficacy of those smoke smudges, and later, of the efficacy of bleeding, down to our own times, as the majority of the medical profession are now of the efficacy of vaccination to prevent the spread of smallpox. How can we be any more sure now that the majority of the medical profession are correct in their belief in the efficacy of vaccination than [redacted] their belief that bleeding was a panacea for all bodily ills entertained for centuries? The day of Doctor Sangredo is past. May it not be possible that that of Doctor Vaccinator may also pass away?

Therefore, there is no basis for the claim that the State has the same right to enforce compulsory vaccination against the individual in order to protect society against the ravages of smallpox, that the State has to quarantine one already afflicted with the disease and those that have been exposed to the contagion or that the State has to compel an individual to serve in the army to repel invasion. In the one case we know absolutely, and, therefore, the courts judicially know, that the isolation of smallpox patients and those that have been exposed

to the contagion does protect society against the ravages of smallpox; but we do not absolutely know that vaccination will prevent the ravages of the disease.

Under the Anglo-Saxon jurisprudence and especially in the development thereof under written constitutions, intended to zealously guard the rights of individuals against governmental encroachment, the persons of individuals have always been regarded as specially sacred. Except on the ground of the commission of a crime and except where the public safety absolutely so requires, it has always been contended by the advocates of individual rights, that even the government has no right to violate the persons of the citizens. So deeply imbedded is this principle in the consciousness of the American people, that the courts have been extremely careful against committing themselves to the doctrine that the State has has the right to require compulsory vaccination.

The State of Texas has no law inflicting compulsory vaccination and the writer is of the opinion that, under a proper construction of both sections 9 and 19 of Article 1, of the Constitution of Texas, individuals are protected against compulsory vaccination except under circumstances where an epidemic is imminent. Section 9 is as follows: "The people shall be secure in their *persons,* houses, papers and possessions, from all *unreasonable* seizures or searches; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation".

And Section 19 is as follows: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land". Section 9 undoubtedly protects the individual in his person against all *unreasonable* seizures, and Section 19 protects

him in his life, his liberties and his immunities against every act of the government that is not in "the due course of the law of the land". To require a person to be seized and forcibly vaccinated in order to prevent him from a possible taking of the disease of smallpox in the future, regardless of whether there is a single case of smallpox within the United States, Canada or Mexico, *would certainly not be reasonable.* And, until the Legislature has enacted a law requiring persons to be vaccinated, surely his seizure and vaccination by others deprives him of the immunity of his person without "due course of the law of the land".

Certainly, the weight of authority, as well as of reason, is that, in the absence of express power conferred by law upon municipalities to require vaccination as a condition precedent to the admission of children to the public schools, such municipalities have no such power, except temporarily in case of an emergency. (McSween vs. Board of Trustees, 129 S. W., p. 206; 24 Ruling Case Law, 632, Section 90, and cases cited in note; 21 Cyc. 393-4, and authorities cited in notes.

The writer does not contend for a moment that a law requiring compulsory vaccination of all individuals in a locality where an epidemic of smallpox is raging, or even where an epidemic of the disease is imminent would not be a valid exercise of power by the Legislature. Neither does the writer contend that a municipality would not have the authority under a power conferred upon such a municipality to enact ordinances to protect the people against contagious diseases to require vaccination where such an emergency exists. The doctrine, as laid down in the well considered cases is that, the municipality being clothed with such power the courts will not undertake to determine whether or not the power is wisely exercised,

but will uphold the validity of the measures adopted to protect the public in such an emergency regardless of whether the courts consider such measures wise or not. But, even this doctrine must have its limitations. For instance, no court will hold that, an ordinance requiring all persons found afflicted with smallpox or with yellow fever to be at once killed and their bodies burned in order to prevent the spread of contagion, would be a valid exercise of power to take measures to protect the public from contagious diseases. Nor would any court uphold an ordinance requiring the destruction of a person's residence because of a case of smallpox therein as valid. Such ordinances would not be reasonable, and reasonableness is absolutely essential to the validity of all ordinances adopted by municipalities.

The charter of the City of San Antonio confers power upon the municipality "to enforce vaccination". This is the only language in the charter with respect to vaccination. The city, then, undoubtedly had and has the power to adopt an ordinance reasonable in its provisions to enforce vaccination. But the provisions of the ordinance must be reasonable, otherwise, the ordinance would not be valid. (City of Austin vs. Austin Cemetery Ass'n, 87 Tex., 330; Milliken vs. the City Council, 54 Tex., 388; Mills vs. M. K. & T. Ry. Co., 94 Tex., 242.) The power of the city in this respect cannot be arbitrarily exercised. For instance, an ordinance adopted by the City Council requiring all barbers to be vaccinated, but no one else in the city, would certainly not be valid for the reason that, while the city might make a classification of its citizens with respect to the enforcement of vaccination, this clasification would have to be reasonable. No valid reason could exist why barbers should be vaccinated, while others pursuing other occupations were let go scot free. It will be noticed that the power to enforce

vaccination is conferred upon the municipality in general terms. No power whatever is conferred upon the City Council to discriminate unless such discrimination would be reasonable. For instance, an ordinance requiring all persons to be vaccinated except babies a few days old and the sick and those whose lives would be endangered thereby, wouud be reasonable. But what valid reason can exist for selecting children attending the schools and persons connected with the schools as the victims while all others are allowed to go free? But the discrimination feature of the ordinance will be discussed further on.

Since the general demurrer to appellant's petition was sustained by the trial court, every fact well pleaded in the petition must be taken as absolutely true in determining the correctness of the ruling of the trial court. This is elementary.

Rosalyn Zucht's petition alleges that no other power was conferred upon the city with reference to vaccination than that stated in the language set forth. This is confessed as true.

The first question that arises then is: Does the charter of the city confer upon it the power and authority to require the citizens to be vaccinated regardless of whether or not a single case of smallpox exists within the city, within the county,, within the State, or even within the United States, Canada or Mexico?

We respectfully submit that an ordinance that would require the citizens to be vaccinated whenthere was not a single case of smallpox in the United States, Canada or Mexico, would be void for the simple reason that such an ordinance would be unreasonable; and every power conferred upon a municipal corporation to legislate upon a matter is always subject to the implied condition that

the ordinance governing the particular matter must be reasonable in order for the ordinance to be valid. (City of Austin vs. Austin Cemetery Association, 87 Tex., 330.) Such an ordinance would also be void because it would conflict with Section 9 of Article 1, of the State Constitution, which protects the citizen in the security of his person against unreasonable seizure.

The power to seize a man and inflict vaccination upon his person against his will cannot exist, except in a case of emergency when an epidemic of smallpox already exists or when the danger of such an epidemic is imminent.

Now the ordinance of the City of San Antonio, whenever the City Board of Health issues its ukase as to any school or other institution of education, requires the children attending or connected with such school or institution to be vaccinated as a condition precedent to their admission to such school or institution regardless of whether or not there is a single case of smallpox existing in the entire State, or for that matter, within the limits of the United States, Canada or Mexico. This is plain upon the face of the ordinance itself, and no court can read into this ordinance a proviso that it shall not be enforced, or to be more correct, is to be in effect only when an epidemic of smallpox actually exists or such an epidemic is imminent, unless the court undertakes to exercise legislative power, which is denied to the courts by Article II of the State Constitution. (Summers vs. Davis, 49 Tex. at page 555; Sutherland on Statutory Construction, Sec. 235.)

We have already adverted to the fact that the ordinance discriminates against those attending schools and those connected therewith. We contend that this dis-

crimination is of such nature as renders the ordinance absolutely void, and on this account alone, not only because it makes the ordinance unreasonable, but also because it violates the XIV Amendment to the Constitution of the United States, which forbids a State to deny to persons within its jurisdiction the equal protection of the laws.

But is is contended that, since the ordinance bears alike upon all attending all schools within the city limits, it does not discriminate. We admit that the legislative body can classify the citizens and adopt valid ordinances that apply to persons in certain classes that do not apply to persons in other classes, provided the classification itself is reasonable. An ordinance regulating butcher establishments, requiring those undertaking to conduct such establishments in the city to take out licenses, etc., might be perfectly valid, though no such regulation should be made with reference to dry-goods establishments. There would be reason for the classification based upon the nature of the business. But an ordinance requiring all butchers in the city to keep their residence premises clean and visiting penalties upon them for a failure to do so when no such requirement was made as to the residences of persons pursuing other occupations in the city would be absolutely void. Why? Simply because there would be no reason for such an arbitrary classification. There could be no reason requiring a butcher to keep his residence premises clean that would not require every other resident to do the same. Such a classification of the citizens would deprive those pursuing the occupation of a butcher of the equal protection of the laws. (Yick Wo vs. Hopkins, 118 U. S., 365.)

Now let us apply these principles to the ordinances in question. The ordinance does not require any person to be vaccinated except those that attend the schools and

other institutions of education in the city. And when the Board of Health issues its edict as to a particular school or institution of education, the ordinance requires all those that attend the school or institution of education to be vaccinated, whether there is a single case of smallpox in the city or not, and whether there is a single case of smallpox in the United States, Canada or Mexico or not. The city has no other ordinance on the subject of vaccination. Is there anything in the nature of attending the schools that makes a person who does so more likely to take the smallpox and spread the disease than those that attend other places or follow other occupations? If so, what is it? Why, it may be urged, children from all over the city go to the schools. Do not children from all over the city go on the street cars, attend the moving picture shows, go to the churches and attend the Sunday schools? But persons in close personal contact, like children and teachers in schools, are more likely to spread the contagion than others, it is contended. Is this true? Are not persons on the street cars, in the theaters, and in the moving picture shows in just as close personal contact as those in the schools? Is there any more danger of contracting smallpox in the public schools than there is in passenger depots of the railroads in the city, or in the factories of the city, or in the crowds that gather in the Mexican Quarter of the city where the sanitary conditions are not good? What reason, we ask, exists for requiring vaccination as a condition precedent to attendance on the schools that does not exist for requiring vaccination of those that attend these other places? The truth is, and everyone knows it, that there is more danger of contracting smallpox and spreading the contagion in the other places named than there is in the schools. It has never been held by any court that, in order for a classification of citizens made by any law to

be reasonable, this classification must be absolutely correct in the minutest detail. Just so, taking the population as a whole, the classification is reasonable with approximate certainty, then such classification will be upheld by the courts.

But, under the allegations of Rosalyn Zucht's petition, which are confessed to be true by the general demurrer, the classification of the inhabitants of the City of San Antonio made by the ordinance in question is certainly not reasonable. It is shown by the allegations of the petition that there is much more danger to the public at large of the contagion of smallpox being spread by reason of the daily and nightly gatherings of the people together in other places than in the daily gathering of the pupils and teachers in the schools. Therefore, the classification of the citizens made by the ordinance requiring all those who attend the schools or who are connected therewith to be vacinated, while the burden is not placed upon others under like circumstances and even under worse conditions, is not based on any valid reason.

It follows that the ordinance of the city in question is absolutely void for this reason alone. Being void, it could be no justification to the City officials for excluding Rosalyn Zucht from the benefits of the School Fund provided by the Constitution and Laws of the State.

But the ordinance of the City of San Antonio is absolutely void for another reason and that is because it leaves it to the arbitrary discretion of the Board of Health of the city to determine when all the teachers, pupils, employes and other persons connected with a particular institution of education shall be vaccinated. All the courts of all the states that have had occasion to pass upon the validity of such an ordinance made by a municipal corporation have invariably held such an

ordinance to be absolutely void; and the Supreme Court of the United States also holds the same.

Paraphrasing the language of the court in Rich vs. Nashville, 42 Ill., App., 222, the law may be stated thus: Where the enforcement of an ordinance requiring vaccination as a condition precedent to admission to the public schools, is left to the unregulated discretion of some officer or board of officers, the ordinance cannot be other than partial and discriminating in its practical operation. Such officer or board of officers may enforce the ordinance as to one and not enforce it as to another, where the conditions are precisely the same, and thus practice favoritism. The law abhors partiality and discrimination; and any ordinance of a municipal corporation that is so framed as to allow its enforcement to rest in unregulated official discretion is unreasonable, oppressive and void.

The same can be said of the ordinance in question in the case at bar that was said by the Supreme Court of Maryland with reference to the ordinance of the City of Baltimore in the case of Baltimore vs. Radecke, 49 Md., 217. The City Council of the City of Baltimore adopted an ordinance that required every one desiring to use a steam engine within the limits of the city to obtain a permit from the mayor and City Council, and required such person to remove such steam engine upon six months' notice given by the Mayor In holding this ordinance unreasonable and void, the Supreme Court of Maryland said:

"It lays down no rules by which its impartial execution can be secured or partiality or oppression prevented. And when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper in-

fluences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to everyone who gives the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to hold it inoperative and void."

This language is quoted with approval by the Supreme Court of the United States in the case of Yick Wo vs. Hopkins, 118 U. S., 356. In that case the City Council of the City of San Francisco had adopted an ordinance which prohibited anyone from carrying on a laundry business in the city without having first obtained the consent of the board of supervisors unless such business should be conducted in a brick or stone building. The Supreme Court held that the ordinance was not only unreasonable and void by reason of vesting arbitrary discretion in the board of supervisors, but also as being a violation of XIV Amendment to the Constitution of the United States in that it denied to persons the equal protection of the laws.

The exercise of arbitrary power by any man or set of men is inconsistent with the very vital principle of our government which has been framed to be a "government of laws and not of men".

The ordinance provides no rule by which the Board of Health are to be guided in determining whether or not the ordinance shall be enforced as to any institution of education, but leaves the matter entirely to the opinion of the Board. The language of the ordinance is:

"Whenever, in the opinion of the Board of Health, it is necessary for the public health, or the health of any

such place or institution of education set forth in Section I of the ordinance that all such teachers, pupils, employes and other persons connected therewith be vaccinated, said Board may require such vaccination within such period of time and under such regulations as said Board of Health may require".

The ordinance does not provide that, when a case of smallpox occurs among any of the pupils of an institution of education or among the persons connected therewith or that, when a case of smallpox occurs in the locality where the institution is situated, the Board of Health may require all the pupils and persons connected with such institution to be vaccinated; nor does the ordinance undertake to fix any rule by which the Board are to be guided in determining whether or not vaccination is to be enforced in such institution; but leaves the matter entirely to the arbitrary opinion of the Board.

Thus, the Board can, with or without any valid reason, select any institution of education in the city and enforec vaccination against the pupils thereof and the persons connected therewith, leaving all other institutions of education alone, though the circumstances and conditions as to these may be precisely the same. Then, by the terms of Section 3 of the ordinance, every pupil of, and every person connected with, the institution of education and every parent or guardian of every pupil attending such institution who fails to comply with the requirement of the Board is to be punished by a fine of not less than ten dollars nor more than one hundred dollars each day that such failure continues, and shall be imprisoned if he is unable or refuses to pay the fine, while the pupils of and the persons connected with all other institutions of education within the city where precisiely the same circumstances and conditions exist are undisturbed.

In this connection, we cannot do better than quote the language of Mr. Justice Matthews delivering the opinion of the Supreme Court of the United States in the case of Yick Wo vs. Hopkins, as follows:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself r e m a i n s with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possession, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intoler-

able in any country where freedom prevails, as being the essence of slavery itself".

If there ever was a law or ordinance that undertook to confer upon a set of officials arbitrary discretion in governmental affairs, the ordinance of the City of San Antonio is such a one. It will probably be urged that it will be presumed that the Board of Health will never abuse this discretion, but will always act impartially and without oppression in enforcing the ordinance, and will never enforce it unless a necessity exists therefor in fact. But so it could be argued in favor of a despotism instead of a government of laws. It might be presumed that the despot would always be a wise man and would never abuse his authority. But, if the government of Texas is a government of laws (as it is supposed to be) and not of men, the individual in the State does not hold his life, his liberty or his property at the discretion of any officer, be he a wise man or a fool, be he a broad-minded liberal man or a fanatic.

Facts are alleged in the petition of Rosalyn Zucht that show that this presumption that public officials will always exercise any discretion given them by law as to a particular matter impartially and without oppression cannot be indulged, at least in the case at bar. These facts are admitted to be true by the general demurrer of the city officials. And the facts alleged are these: "Many other pupils and other persons were attending the said school that she (Rosalyn Zucht) was attending as well as the other public free schools of said Independent School District and other educationl institutions that had not been vaccinated and had not complied with said ordinance and had never presented certificates of vaccination as required by said ordinance, and yet said other pupils and persons were permitted to continue to attend

said school and said other schools and other educational institutions without having complied with said ordinance and without having been vaccinated and without having presented any certificates of vaccination as required by said ordinance after said plaintiff (Rosalyn Zucht) had been expelled". (Record, pp. 8-9.)

And it is further alleged: "There is and always has been not even a pretense of enforcing said ordinance against the pupils of and the persons connected with the private schools and other educational institutions in said city; but the pupils of and the persons connected with said private schools and educational institutions in said city are now being permitted to attend the same without having been vaccinated and without having presented any certificates of vaccination as required by said ordinance, except that, when the plaintiff (Rosalyn Zucht) herein and her brother undertook to attend one of said private schools without having been vaccinated, the authorities of said city, being the defendants (the city officials) herein (and especially the said W. A. King) notified the principal of said private school that, if he continued to permit the plaintiff (Rosalyn Zucht) and her brother Arthur Zucht, to continue to attend said private school, they would close his school; and thereupon the plaintiff (Rosalyn Zucht) and her brother were compelled to cease attending said private school. The conditions and circumstances as to said other schools and educational institutions with reference to smallpox were and are precisely the same as those as to the school plaintiff (Rosalyn Zucht) was attending.

"The foregoing facts are and were well known to the defendants (the city officials) and each of them, yet the defendants (the city officials of said city) and each of them wantonly and maliciously discriminated against

plaintiff (Rosalyn Zucht) because plaintiff (Rosalyn Zucht) would not submit to vaccination and for other unlawful reasons, and wantonly and maliciously refused to permit plaintiff (Rosalyn Zucht) to attend any of said public schools". (Record, pp. 8-9.)

This presents the last question with reference to the validity and enforcement of said ordinance that we shall discuss

We contend that even if the ordinance itself had been fair on its face and impartial in apearance, yet, it is applied and administered by the public authorities with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations in similar circumstances, and that, therefore, Rosalyn Zucht has been denied equal justice in violation of the XIV Amendment to the Constitution of the United States.

The argument was made in the trial court, and to our astonishment, it seemed to have decisive weight with the trial court, that the position taken for Rosalyn Zucht on this question is substantially, that the mere fact that a public officer whose duty it is to arrest all thieves arrests only one and lets others go scot free, makes it the duty of the court to acquit the thief arrested though proved to be guilty beyond reasonable doubt, since, otherwise, discrimination would be practiced as between thieves.

We respectfully submit that this is not the position taken by Rosalyn Zucht, nor is such a position analogous to the position taken by her. Her position is that the officials of the city, acting as public authorities of the City of San Antonio and of the San Antonio Independent School District, have deprived her of her rights to participate in the benefits of the public free school fund

to which benefit she is entitled under the laws and constitution of the State, while they are allowing others under precisely the same conditions and circumstances to have these benefits, and in so doing have acted knowingly, deliberately and maliciously against her. The reasons given by the city officials for excluding her from the public schools and driving her and her brother away from a private school in that she has not been vaccinated. She replies that these officials are not excluding others from the public schools or driving them away from private schools by threatening to close such schools for this reason, although these others are in precisely the same circumstances and under precisely the same conditions that she is.

When a public officer, from some corrupt motive, lets one offender against the law go free, while he enforces the law against others, this isolated act could hardly be considered the act of the State. But if the executive authorities of the State should uniformly enforce even a valid penal law against only one man and should uniformly never attempt to enforce it against all others who violate it, we apprehend that this would be a denial of the equal protection of the laws within the meaning of the XIV Amendment to the Constitution of the United States, for, in such a case, the uniform course of its executive authorities would conclusively show that the State itself, through its executive department, was denying to persons within its jurisdiction the equal protection of the laws. We respectfully submit that equal justice cannot exist in a country where even a valid penal law is enacted but it is uniformly, knowingly and deliberately enforced against one man only or one set of men only, while all others are allowed to violate it with impunity. If such an evasion should be tolerated, then the beneficent provision of XIV

Amendment to the Constitution of the United States requiring the State to give to all persons within their jurisdiction the equal protection of the laws would be nullified.

In the case of Yick Wo vs. Hopkins Supra, it was shown that the ordinance was enforced against the Chinese only, while there was not a pretense of enforcing it against anyone else. The Supreme Court of the United States held that this was a violation of the XIV Amendment to the Constitution of the United States regardless of whether or not the ordinance in that case had been valid on its face. The Court say:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution".

In Carter vs. State of Texas, 177 U. S., 442, it was not claimed that there was any prejudice or discrimination done or made by the law of the State relative to selecting members of the Grand Jury. In other words, the law itself was and is absolutely fair on its face. But the practice of the officers of the State charged with the administration of the law had been for many years such as to absolutely exclude persons of African descent from being members of any Grand Jury in the County of Galveston. Carter, who was a person of African descent, and who had been indicted by a Grand Jury in the County for murder, moved to quash the indictment on the ground of the discrimination against him and others of his race, setting up all the facts in his motion and tendering proof of such facts. The trial court declined to hear any testimony as to the facts and overruled the motion. He was convicted, and, on appeal, assigned as error the discrimination against

him as a violation of the XIV Amendment to the Constitution of the United States, in that he had been denied the equal protection of the laws of the State by the partial and discriminating manner in which the law of the State was administered by the officers of the State. The Court of Criminal Appeals of Texas offirmed the judgment against him. On writ of error in the Supreme Court of the United States, this Court held that the action of the State authorities, in discriminating against Carter in the manner alleged in his motion, violated the XIV Amendment to the Constitution of the United States.

The decision in Ah Sin vs. Wittman, 198 U. S. 500, is not at all in conflict with the decisions in the cases of Yick Wo vs. Hopkins, and Carter vs. Texas, hereinbefore cited. Indeed, the decision in Ah Sin vs. Wittman refers to the decision in the case of Yick Wo vs. Hopkins in such a way as to show that the Court by its decision approve in the Ah Sin vs. Wittman case the decision of the Court in Yick Wo vs. Hopkins.

There are expressions contained in the decision of the Court in Ah Sin vs. Wittman from which it is argued that the protection afforded by the XIV Amendment only applies when there is discrimination against a class or race, and that the XIV Amendment affords no protection in a case where a single individual is discriminated against.

The decision of the Court most certainly announces no such doctrine as that contended for, and we cannot believe that this Court will ever so hold. To so hold would be to nullify the plain language of the Amendment itself, for, it says: "Nor deny to *any person* within its jurisdiction the equal protection of the laws".

The Amendment stretches its aegis as a protection to a single individual, no matter how lowly, just the same as it does to any class or any race. And in this respect the real greatness of this Amendment to our National Constitution appears in its most striking light. It realizes to the fullest extent the truth of the proposition for which we have so earnestly contended at the beginning of this discussion, and that is: the rights of the individual constitute the keystone of the social building which, if once destroyed, must cause, sooner or later, the edifice, no matter how colossal, to crash down in utter ruin.

We respectfully submit that the judgments of the State Courts should be reversed and that the cause should be remanded to the trial court in order that the case may be tried and determined according to law and justice.

DON A. BLISS,

Attorney for A. D. ZUCHT,
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ROSALYN ZUCHT.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 84.

ROSALYN ZUCHT, BY A. D. ZUCHT, NEXT FRIEND,
PLAINTIFF IN ERROR,

vs.

W. A. KING ET AL., DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR

In reply to that part of the brief of defendants in error, trying to make it appear that plaintiff in error has not correctly set forth in her petition the ordinance of the city of San Antonio, we have simply to say that plaintiff in error's counsel set forth the ordinance in her petition just as it is found in the printed book of the ordinances of said city, and the general demurrer of the defendants in error has the effect to admit for the purposes of the demurrer that said ordinance is correctly set forth in said petition.

It is too late in this court to undertake to show that the ordinance complained of by plaintiff in error is different from what she states it to be in her petition.

Jurisdiction.

Defendants in error undertake to prevent a decision by this court of the real vital questions in the case by undertaking to show that plaintiff in error should have appealed from the action of the members of the Board of Health of the city of San Antonio, in causing her to be expelled from the public schools of the city of San Antonio, and causing her to be expelled afterwards from a private school, to the Superintendent of Education of the State of Texas, and to the State Board of Education, claiming that until she had made said appeals, and they had been determined against her, she had no standing in court.

The same contention was made in the trial court (Record, p. 12), and we suppose this contention was also made in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, but this contention was so manifestly without merit that it was not even considered either in the trial court or by the Court of Civil Appeals.

The articles of the Revised Statutes of Texas, quoted in the brief of the defendants in error on pages 8-9, show very clearly that no appeal by plaintiff in error would lie from the action of the Board of Health of the City of San Antonio to either the State Superintendent of Education or to the State Board of Education. The ordinance of the City of San Antonio attacked, is no part of the school laws of the State; and plaintiff in error is not complaining of any ruling or decision of subordinate school officers as such.

It seems that counsel for defendants in error had not posted themselves as to the provision of the school laws of the State of Texas. It is averred in the petition of the plain-

tiff in error that the San Antonio independent school district is incorporated by a special law, passed by the Legislature of the State as an independant school district. Counsel for defendants in error certainly ought to know that there is no provision, whatever, in this special law that authorizes any appeal, whatever, to the State Superintendent of Education or to the State Board of Education, even from the acts of the school officers of said independent district, much less from the acts of officers of the city of San Antonio, an entirely separate and distict corporation. Had counsel for defendants in error examined the constitution and statutes of the State of Texas more carefully, they would have found that the Constitution of the State authorizes the Legislature of the State to incorporate by special law, independent school districts—that is to say, school districts absolutely independent in the management of their affairs of the State Board of Education and of the State Superintendent of Education; and also that there is a general law enacted by the Legislature whereby independent school districts can become incorporated without any special act of the Legislature.

With reference to this latter class of independent school districts—that is to say, independent school districts organized under the general law, it is only where such a district has less than 500 scholastic population that an appeal lies to the County Superintendent, then to the State Superintendent, and finally to the State Board of Education. (See Art. 2752, of the Revised Statutes of the State.)

But, as before stated, plaintiff in error is not complaining of the action of school board or school officers as such. She is complaining of an ordinance of the City of San Antonio, claiming that such ordinance is absolutely void in that it

violates the 14th Amendment to the Constitution of the United States; and she is also complaining of the manner in which said ordinance is being administered by the city authorities of the City of San Antonio, Texas, as being in violation of the 14th Amendment to the Constitution of the United States.

Counsel for defendants in error seem to labor under the impression that plaintiff in error is complaining of the action of school officers of common school districts. It would be tedious to undertake to set forth the provisions of the school laws of the State of Texas, and, besides, it could only confuse the court. It will suffice to say that the laws of Texas classify districts. There are provisions relating to common school districts, and there are provisions relating to independent school districts.

Every decision cited by counsel for defendants in error in their discussion of the question of jurisdiction, is a decision with reference to a dispute between some person and the officers of some common school district.

Thus the case of Adkins *vs.* Heard, 163 S. S., 127, was a case where certain tax payers brought suit against a common school district and the trustees thereof, seeking the issuance of a writ of injunction, prohibiting said district and the trustees thereof from carrying out a contract with certain teachers.

The case of McCollum *vs.* Adams, 110 S. W., 526, was a case where two common school districts had been consolidated, and suit was brought by certain tax payers in the common school district, abolished, against the trustees of the consolidated district as such.

The case of Cochran *vs.* Patillo, 41 S. W., 537, was a suit

brought against the trustees of a common school district to compel the reinstatement of a pupil.

The case of Harkness *vs.* Hutcherson, 90 Texas, 383, was a case where a judgment had been obtained by a teacher against a common school district and the suit was brought by the teacher against the trustees of said common school district, as such, for a writ of mandamus, compelling them to pay the judgment.

Boyles *vs.* Potter, 177 S. W., 210, which counsel for defendants in error claim is a square adjudication of this question involved in plaintiff in error's suit, was a suit brought by a teacher against a common school district on his contract with that district.

We will not undertake to state the other cases cited by counsel for defendants in error in their brief, believing that what we have said on the subject is sufficient to show this Court that there is not the slightest merit in this position of adverse counsel. No attention, whatever, was paid to it by the Court of Civil Appeals, for the reason that the Court of Civil Appeals considered it utterly untenable.

We cannot, for the life of us, understand the reason for the first and second counter-propositions contained in the brief of defendants in error. We have certainly never asserted such a silly proposition as that an ordinance could be held to be unconstitutional, because such ordinance was administered partially and oppressively. Neither have we ever urged that the mere fact that some persons have not been prosecuted or punished for their crimes, ought to give impunity to others.

As pointed out in our original brief, this is a misstatement of the position of the plaintiff in error. So the third and

fourth counter-propositions of defendants in error have no bearing, whatever, upon the plaintiff in error's case.

On page 23 of the brief of defendants in error is a quotation from the opinion of the Court of Civil Appeals in this case. This quotation states that plaintiff in error conceded that smallpox existed among the Mexicans in the City of San Antonio all the time. This was a glaring mistake made by the learned Judge who wrote the opinion of the Court of Civil Appeals, as will be seen by an examination of her petition in the Record, pp. 1-9. On the contrary, plaintiff in error alleged in her petition that there were no cases of smallpox in the City of San Antonio at the time. The Judge of the Court of Civil Appeals conceded that this was a mistake in his opinion on the motion for rehearing, though he made it with very ill grace, Record, pp. 45-46.

Counsel for defendants in error do not seem to be well posted in reference to the Child Labor Law of the State of Texas, for they say in their brief that the Child Labor Law of Texas excludes children from factories and laundries, thereby seeking to convey the impression that no one of the school age in the City of San Antonio could work in a factory. Had they paid the slightest attention to the provisions of the law, they would not have made this mistake. The school age in the City of San Antonio includes persons from seven to twenty-one years of age.

Respectfully submitted,

DON A. BLISS,

Attorney for A. D. Zucht, Next Friend of Rosalyn Zucht, Plaintiff in Error.

No. [redacted]84

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

File No. 28277

ROSALYN ZUCHT, *by A. D. Zucht, Next Friend,*
PLAINTIFF IN ERROR,

VS.

W. A. KING, *et al.*, DEFENDANTS IN ERROR.

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No. 326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

File No. 28,277

ROSALYN ZUCHT, *by A. D. Zucht, Next Friend,*
PLAINTIFF IN ERROR,

vs.

W. A. KING, *et al.*, DEFENDANTS IN ERROR.

Brief for Defendants in Error

STATEMENT OF THE CASE.

Since plaintiff in error's statement of the case is not a concise abstract, presenting succinctly the questions involved and the manner in which they are raised, we submit the following in lieu thereof:

The important civic question presented by this case is *whether the members of a board of education, its business agent, one of its school principals and a city health physician are liable in damages for expelling a pupil from city public schools because of her failure and refusal to be vaccinated in compliance with city ordinances;* and as incidental to this relief, whether such pupil would be entitled

to injunction to restrain the enforcement of such ordinances, and mandamus to compel her re-admission to the schools without vaccination. This question arises upon the action of the trial court in sustaining a general demurrer to plaintiff in error's petition, and is presented by her three assignments of error in this court. (Pet., Record, pp. 1 to 10; Ans. of Defts., Evans, et al., Record, p. 11; Ans. of Deft., W. A. King, Record, p. 21; Ans. Deft. Mrs. Leary, Record, p. 22; Judgment, Record, p. 25).

From the petition it appears that defendants in error "pretend to have acted in their official capacities" in expelling her from school and in refusing to permit her to attend unless she would submit to be vaccinated, and "profess to have acted in obedience" to a certain ordinance hereinafter referred to. (Pet., para. 20, Record, p. 8).

It is alleged in said petition that the Legislature conferred the following power upon the City of San Antonio by Section 60 of its special charter:

> "To prevent the introduction of contagious diseases into the city, to make quarantine laws for that purpose and to enforce the same within five miles of the city; and to make all ordinances and regulations to prevent the spread of any contagious diseases within the city limits; to enforce vaccination and to establish pest houses and to regulate the establishment of private hospitals." (Pet., para. 5, Record, p. 3).

According to the petition, no other power with reference to vaccination besides that above quoted is conferred by the city charter. But Section 125 of this charter provides that same "shall be deemed a public act, and be read in evidence without pleading or proof, and judicial notice shall be taken thereof in all courts and places" (Special Laws of Texas, 1903, p. 345); and by the terms of Section 59 of said charter the further power is conferred upon the

city "to do all acts and make all regulations which may be deemed necessary for the protection and promotion of health or the suppression of disease, etc." (Idem., p. 334).

It is alleged in said petition that the city council, acting presumably under the above charter provisions, passed "an ordinance," the same being set out at length. As a matter of fact, the breaks in the subject-matter, the sequence of sections and the references in the penal clauses, all plainly indicate that the so-called "ordinance" is really three separate and distinct ordinances; the first three sections quoted, 25, 26 and 27, constituting one ordinance, the next three sections, 1, 2 and 3, constituting another, and the next two sections, 4 and 7, constituting parts of still another ordinance. We make this statement in the interest of fairness,—believing that counsel for plaintiff in error would not deliberately garble the record; but, of course, if this cannot be considered as evident upon the face of the petition, the "ordinance" must be treated in its hybrid state. This could not conceivably, however, affect its validity as concerns this case, and parts of it could stand, though other parts be deemed invalid.

The first ordinance says that no child or other person shall be permitted to attend any of the public schools, or any place of education in the city, without first presenting to the city physician certificate of successful vaccination within preceding six years; authorizes the city physician, or his assistant, to in turn give another certificate of such vaccination to the school superintendent, principal, or teacher, and fixes a penalty of from $10.00 to $100.00, or from ten to thirty days in jail, against any person sending, or attempting to send, a child to any school, etc., without having it vaccinated, as well as against any physician giving a false certificate, and all persons admitting any child or other person in attendance in any school, etc., without

such certificate of vaccination. (Secs. 25, 26 and 27, Petition, Record, pp. 4-5).

The second of these ordinances makes it the duty of all persons conducting any place or institution of education within the city to furnish the Board of Health, whenever required, a certified list of teachers, pupils, employees, and other persons connected therewith, showing time and place of their vaccination, or the fact that they had not been vaccinated; authorizes the Board of Health to require certificates of some qualified physician that these persons have been successfully vaccinated within the preceding seven years; empowers the Board of Health to require vaccination whenever in its opinion it is necessary for the public health, or the health of any such place or institution of education; and fixes a penalty of from $10.00 to $100.00 against any person failing to furnish such list, or any person failing to comply with the vaccination regulation prescribed by said board. (Secs. 1, 2, 3, Petition-Record, p. 5).

The third of these ordinances requires every parent, guardian, or person having the care, custody or control of any minor or other individual to cause and procure such minor or individual to be promptly and effectively vaccinated, and fixes the penalty of from $5.00 to $100.00 for violation of this provision of the ordinance, as well as other provisions not stated in the petition. (Secs. 4 and 7, Petition-Record, pp. 5-6). Since there could be no pretense that defendants in error as officials, acted under this ordinance in expelling plaintiff in error, and since they do not appear to have anything to do with its enforcement, this ordinance has no special importance in considering the demurrer.

Plaintiff in error, by her petition in the trial court, claimed that these ordinances were void for various reasons not here material, and by her petition and assign-

ments in this court she contends that said ordinances are invalid upon the following grounds:

First: That since they apply only to persons attending schools they constitute a discrimination denying to such persons, including plaintiff, the equal protection of the laws, because such classification with respect to vaccination is unreasonable and arbitrary, in view of the conditions in the Mexican quarter of the city, and the crowding together of people in street-cars, jitneys, theaters, churches, passenger depots, factories, laundries, parks, etc. (Pet. Paras. 22, 4, 9, 10, 11, Record, pp. 2, 4, 6; First Assignment and Second Proposition, her Brief, pp. 13 and 18);

Second: That the ordinance with reference to the Board of Health undertakes to commit to the arbitrary discretion of said board a determination of the necessity of a vaccination requirement and all the details of such requirement, without providing any safeguards against partiality and oppression, in violation of the 14th Amendment of the Federal Constitution (Pet., para. 23, Record, p. 9; Second and Fifth Assignments and First Proposition, her Brief, pp. 13, 15, 17).

As ground of action against the defendants in error, plaintiff alleges that they "conspired together to expel her from school, and said defendants and each of them, acting wantonly and maliciously, refuse to permit her to attend said school or any other public school in said city any longer unless she will submit to vaccination, and the said defendants and each of them have thereby deprived her of the benefits of an education, and of the benefits of her proportionate part of said public free school fund provided by the Constitution and laws of Texas." (Pet., para. 17, Record, p. 7).

By way of damages, it is alleged "that the plaintiff has been humiliated and put to shame and her feelings have been injured and her standing in the community has been

injured; and thereby plaintiff has been damaged by the defendants and by each of them in the sum of $10,000.00." (Pet., para. 21, Record, p. 9).

In addition to damages the petition asks for mandamus compelling the defendants to re-instate plaintiff, and for injunction restraining the defendants from enforcing the ordinance against plaintiff.

Besides the alleged invalidity of the ordinance, plaintiff in error makes the further contention in this court, as an additional basis for damages and equitable relief, that the partial and discriminatory manner in which these ordinances are claimed to have been administered by defendants in error, in that other pupils are permitted to attend school unvaccinated while plaintiff and her brothers are excluded, constitutes a denial to plaintiff of the equal protection of the laws. (Pet., paras. 10, 15, 20, 24, Record, pp. 4, 7, 8, 10; Third and Fourth Assignments and Third Proposition, her Brief, pp. 13, 14, 20).

It will be noted that the only explanation given in the petition as to why plaintiff does not submit to vaccination is simply that she "never has been vaccinated, nor is she willing to be vaccinated, nor are her parents willing, because she and her parents fear that vaccination will endanger her health and life." It is not claimed that she is in bad health, nor is any reason given, other than this, why she should specially be excepted from the operation of the vaccination ordinances. (Pet., para. 15, Record, p. 7).

It will be further noted that there is no allegation in the petition that any kind of an appeal has been taken from the alleged action of the defendants to the state superintendent of public instruction. This, of course, is a fatal omission, as such an appeal is a prerequisite to a suit for damages, injunction or mandamus under the terms of the

state law (Revised Statutes of 1911, Arts. 4510 and 4511), hereinafter set forth (post, p. 8). If this is the case, as we contend it is, then the judgment herein is sustained on non-Federal ground, and this court has no jurisdiction of this cause.

Twice before the defendant school authorities have been attacked by the Zuchts because of their enforcement of vaccination, and both times the state appellate court's ruling has been favorable to the authorities, but has gone off on the School Board's rule and on issues of fact as to the existence of smallpox—thus leaving the way clear for this attack. (Zucht vs. San Antonio School Board, 170 S. W., 840; Staffel et al. vs. San Antonio School Board, 201 S. W., 415).

This time the questions are squarely presented by general demurrer as to *whether the ordinances under which defendants in error are compelled to act are valid or invalid, and, if valid, whether they can be held liable in damages for doing their duty under such ordinances;* and also by said general demurrer there was properly raised and involved the failure of plaintiff to appeal to and bring said matter before the State Superintendent of Public Instruction, and thence to the State Board of Education, as a prerequisite to the right of plaintiff to maintain this suit. All of the issues arising thereon, including those here presented, have been determined favorably to defendants in error by the Texas Court of Civil Appeals, as well as by the State Supreme Court, through its refusal of writ of error herein (Record, pp. 30, 74; 225 S. W., 267, 226 S. W. XXIV).

DISCUSSION OF JURISDICTION.

Though plaintiff in error's ground of action is her alleged wrongful expulsion from the state public schools by defendants in error, as local school authorities, her petition wholly fails to allege that she took any kind of appeal in this matter to the State Superintendent of Public Instruction. In view of the want of this averment, held necessary by Texas decisions in construing Texas statutes, as presently shown, and even though it were conceded that the ordinances in question as well as the acts of defendants were within the inhibition of the 14th Amendment of the Federal Constitution, still the general demurrer was properly sustained by the trial court, and its judgment stands justified upon this distinct and independent non-Federal ground. Where this is the case the judgment does not depend upon any Federal question, and the Supreme Court of the United States has no power to disturb it. Enterprise Irrigation District vs. Farmers' Mutual Canal Co., 243 U. S., 156, 163-4, and authorities therein cited.

In our brief in the Texas Court of Civil Appeals we urged this fatal defect in the petition as rendering immaterial a decision on the various constitutional questions raised by plaintiff in error, but since that court in its opinion affirmed the trial court's judgment upon the merits of these constitutional questions and did not reach nor refer to the matter here raised, we feel it necessary to direct attention to the status of the Texas law and decisions covering it.

Article 4510 of the Revised Civil Statutes of Texas (1911) provides as follows:

> "The superintendent of public instruction shall be charged with the administration of the school laws and general superintendency of the business

relating to the public schools of the state. *He shall hear and determine all appeals from the rulings of the decisions of subordinate school officers, and all such officers and teachers shall conform to his decisions,* unless they are reversed by the State Board of Education.

Article 4511 of the Revised Civil Statutes of Texas (1911) provides as follows:

> "The state superintendent shall advise and counsel with the school officers of the counties, cities and towns and school districts as to the best methods of conducting the public schools, and shall be empowered to issue instructions and regulations, binding for observance on all officers and teachers in all cases wherein the provisions of the school law may require interpretation in order to carry out the designs expressed therein, also in cases that may arise in which the law has made no provision, and where necessity requires some rule in order that there may be no hardships to individuals, and no delays or inconvenience in the management of school affairs."

In the case of Adkins vs. Heard (163 S. W., 127), the same Court of Civil Appeals that passed on this case, held that a showing of an appeal to the proper school authorities was a *condition precedent* to the court's entertaining an application for injunction. In said case, as well as in the case of McCollum vs. Adams (110 S. W., 526) the error of the trial court in ignoring this omission on the part of plaintiff, was described as *fundamental.* In the McCollum case it is said that for the want of such an allegation the *petition disclosed no cause of action.* Again, in the case of Cochran vs. Patillo (41 S. W., 537, 538) an application for mandamus seeking to compel the reinstatement of an expelled pupil in school, which did not show such appeal, it was said, *failed to show plaintiff entitled to any relief.*

In the case of Harkness vs. Hutcherson (90 Tex., 383, 38 S. W., 1120) it appears that a public school teacher had obtained judgment against the school trustees in the justice court for damages for violating her teaching contract. Upon the refusal of the trustees to pay the judgment plaintiff sought to mandamus them, and the Supreme Court, speaking through Chief Justice Gaines, in answer to certified questions said that, "unless the teacher had been reinstated upon appeal, he had originally no cause of action," and that "unless the relator appealed from the order of dismissal, and unless the order was set aside, she had no just demand against the district, and the judgment in her favor in the justice court was erroneous." Such judgment, however, being merely erroneous—not void,—defendants were not permitted to go behind same, and so mandamus was allowed. It will be noted that the court's remarks are directed *not to the mandamus proceeding, but to the damage suit in the justice court.*

The same is true as to the case of Boyles vs. Potter (177 S. W., 210), which is a square adjudication upon the question here involved. This was a suit by a public school teacher upon a teacher's contract, and the court said "that strict compliance with the requirements of the school law as outlined in the statutes, and a resort to the particular remedies provided in the school law, must necessarily precede the right of any complainant to resort to the courts for relief"; and concluded as follows:

> "Plaintiff's petition clearly shows a failure on her part to bring herself within the statutory requirements, and therefore *the action of the county court in sustaining the general demurrer was correct.*"

Of course, as concerns the equitable remedies here sought, such an omission would undoubtedly be fatal, for

one seeking mandamus or injunction is required to anticipate and negative every fact that could properly be urged against the relief asked. Watkins vs. Huff, 63 S. W., 922; Johnson vs. Elliott, 168 S. W., 968, 972; Kell Mills Co. vs. Bank 168 S. W., 46; San Antonio Fire Fighters vs. Bell, 223 S. W., 506, 509; Screwman's Ass'n. vs. Benson, 76 Tex., 552, 555, 13 S. W., 379.

The Commission of Appeals of this State has very recently passed upon these statutes as applicable to a suit seeking a redistricting of schools, in the case of Jennings vs. Carson (220 S. W., 1090), from which we quote:

> "The question to be determined is whether defendant in error was required, *as a condition precedent to the jurisdiction of the district court,* to prosecute an appeal from the decision of the county trustees to the state superintendent of public instruction, and thence to the state board of education. * * * The county trustees referred to in the amendatory act being subordinate school officers, the language of the article quoted is all-inclusive as to the appeals from their decisions that shall be heard by the state superintendent of public instruction. No exception is provided. The article was construed in Nance vs. Johnson, *supra,* and no limitation as to the character of appeals authorized was suggested. * * *
>
> "We are of the opinion that the petitioners were not entitled to any remedy by injunction in the district court, in the exercise of its supervisory control over the action of the county board, until after an appeal had been taken to the state superintendent of public instruction and the state board of education."

The Supreme Court not only adopted the judgment recommended by the Commission in this case, but also expressly approved its holding on the question discussed.

Other decisions of the Texas Courts in like effect are:

Nance vs. Johnson, 84 Tex., 401, 19 S. W., 559; County Trustee vs. School District, 229 S. W., 697; Young vs. Dudney, 140 S. W., 802, 808; Plumer vs. Gholson, 44 S. W., 1, 3; Caswell vs. Fundenberger, 105 S. W., 1017, 1018; Trustees vs. Dudney, 142 S. W., 1007.

Under these many decisions it is the established law of this state that one does not show a cause of action against school authorities for damages, injunction or mandamus in the absence of an allegation of an appeal to the superior school authorities mentioned in the statute quoted. Plaintiff in error made no such allegation in her petition. This being true, the judgment of the state court is fully sustained by this non-Federal point of decision, rendering wholly immaterial the decision of the Federal Constitutional questions here raised as grounds of jurisdiction by plaintiff in error, and the writ of error should therefore be dismissed, and order of dismissal is respectfully asked by defendant in error.

First Counter-Proposition to Plaintiff in Error's First Proposition.

The Board of Health Ordinance (Sections 1-3, Record, p. 5) lays down, as the prescribed event upon which it is to become effective, the necessity to the public health of the requirement of vaccination and commits to the Board of Health a determination of this event and the details of enforcing the requirement; and it does not confer upon such Board any arbitrary power.

Authorities.

Jacobson vs. Massachusetts, 197 U. S., 11, 27;
State vs. Martin, 204 S. W. (Ark.), 622, 624;
Blue vs Beach, 56 N. E., (Ind.), 89, 92-3;
Lee vs. March, 79 Atl. (Pa.), 564, 566;
Herbert vs. Demopolis, 73 So. (Ala.), 321;

Kirk vs. Wyman, 65 S. E. (S. C.), 387, 389-90;
Zucht vs. San Antonio School Board, 170 S. W., 840, 843;
Hanzal vs. San Antonio, 221 S. W., 237;
Municipal Paving Co. vs. Donovan Co., 143 S. W., 644, 647;
Rhodes vs. Tatum, 206 S. W., 114, 118.
Mulkey vs. State, 201 S. W. (Cr.), 991, 993;
Smith vs. State, 168 S. W. (Cr.), 522, 523;
Plymouth Coal Co. vs. Pennsylvania, 232 U. S., 531, 543;
Curtis Bros. Co. vs. Barnard, 209 Fed. (C. C. A.), 589, 594;
Isenhour vs. State, 62 N. E. (Ind.), 40, 41-42;
People vs. Lange, 110 Pac. (Colo.), 68, 70;
Chicago vs. Washingtonian Home, 6 A. L. R. (Ill.), 1584, 1589-90;
Portland vs. Traynor, 6 A. L. R. (Ore.), 1410, 1414-16;
Durand vs. Dyson, 111 N. E., (Ill), 143, 146;
Sutherland on Statutory Construction, para. 68;
12 C. J., pp. 848, 864, and cases cited;
Note, 12 A. L. R., 1435, 1447.

SECOND COUNTER PROPOSITION TO PLAINTIFF IN ERROR'S FIRST PROPOSITION.

Considering Sections 1-3 as parts of the same ordinance as Sections 25-27 (Record, p. 4), their subject-matter is so distinct that even though Sections 1-3 relating to the Board of Health were invalid, still Sections 25-27 would remain unaffected.

AUTHORITIES.

City of Laredo vs. Frishmuth, 196 S. W., 190, 192;
Crossman vs. City, 204 S. W., 128, 131;
Spann vs. City, 189 S. W., 999, 1003.

THIRD COUNTER PROPOSITION TO PLAINTIFF IN ERROR'S FIRST PROPOSITION.

Considering Section 1-3 as attempted but invalid amendments of Sections 25-27, the latter, not being expressly repealed by the former, would remain valid and operative.

AUTHORITIES.

Galveston Ry. Co. vs. Galveston, 96 Tex., 529;
Heffron vs. Galveston, 75 S. W., 320;
Waters-Pierce Oil Company vs. Texas, 44 S. W., 945;
Same case, 177 U. S., 26, 47;
Eberle vs. Michigan, 232 U. S., 699, 705.

COUNTER PROPOSITION TO PLAINTIFF IN ERROR'S SECOND PROPOSITION.

Since these ordinances do not make an unlawful discrimination against persons attending schools, they do not deny to such persons the equal protection of the laws, in violation of the XIV Amendment of U. S. Constitution.

AUTHORITIES.

City of New Braunfels vs. Waldschmidt, 207 S. W. (Sup.), 303, 304;
McSween vs. Board of School Trustees, 129 S. W., 206, 208;
Zucht vs. San Antonio School Board, 170 S. W., 840, 843;
Jacobson vs. Massachusetts, 197 U. S., 11, 22;
Bissell vs. Davison, 29 L. R. A. (Conn.), 251, 254;
French vs. Davidson, 77 Pac. (Cal.), 663, 664;
Viemeister vs. White, 70 L. R. A. (N. Y.), 796;
State vs. Board of Education, 81 N. E. (Ohio Sup.), 568.

FIRST POINT UNDER FORBIDDING COUNTER-PROPOSITION.

The power to enforce vaccination clearly carries with it the incidental power to properly discriminate in its enforcement.

SECOND POINT UNDER FORBIDDING COUNTER-PROPOSITION.

These ordinances are not unlawfully discriminatory in that they enforce vaccination alone upon persons attending schools; for such class of persons, being mainly composed of children coming in daily contact with one another, is characterized by least resistance to disease, and so constitutes a proper special class for such a health protective measure.

AUTHORITIES.

Herbert vs. Demopolis, 39 So. (Ala.), 921, 922;
French vs. Davidson, 77 Pac. (Calif.), 662, 664;
Abeel vs. Clark, 24 Pac. (Calif), 992, 994.

THIRD POINT UNDER FORBIDDING COUNTER-PROPOSITION.

Since the classification of those attending schools as made by the ordinance has a reasonable basis, the fact that such classification might have been dictated by an improper motive on the part of the council, or that the ordinances might wisely have been made more comprehensive in scope, will not invalidate them.

AUTHORITIES.

Middleton vs. Texas Power Co., 185 S. W. (Sup.), 556, 561;
Gray vs. Lumber Co., 197 S. W., 221, 229;
Houston Electric Co. vs. Mayor of Houston, 212 S. W., 196, 200;
Sturges vs. Beauchamp, 231 U. S., 320, 330;
Miller vs. Wilson, 236 U. S., 373, 380;

Middleton vs. Texas Power Co., 249 U. S., 152, 157;
Schmidt vs. Indianapolis, 14 L. R. A., (N. S.) (Ind.), 787, 791;
People vs. Griswold, L. R. A., 1915 D (N. Y.), 538, 542;
People vs. Metz, 24 L. R. A., (N. S.) (N. Y.), 201, 208;
Consumers' League vs. Ry. Co., 125 Pac.. (Col.), 577, 579;
McQuillin on Municipal Ordinances, paras. 161, 162;
12 C. J., p. 1131, Note 36, p. 1129, Note 23;
6 R. C. L., p. 114.

FIRST COUNTER PROPOSITION TO PLAINTIFF IN ERROR'S THIRD PROPOSITION.

The constitutionality of these ordinances must be determined according to their written words and their necessary effect, in the light of such matters as the court will take judicial notice of, so that the allegations of discrimination as between plaintiff and others in the enforcement of these ordinances can have no bearing upon their constitutionality.

AUTHORITIES.

Judkins vs. Robison, 160 S. W., (Sup.), 155, 157;
Johnson vs. Elliott, 168 S. W., 968, 971;
Powell vs. Pennsylvania, 127 U. S., 678; 32 L. E., 253, 257;
State vs. Nelson, 26 L. R. A., (Ohio St.), 317, 320;
State vs. Archibald, 131 N. W. (Wis.), 895, 898;
Los Angeles District vs. Hamilton, 169 Pac. (Cal.), 1028, 1030;
Stevenson vs. Colgan, 14 L. R. A. (Cal.), 455 and Note;
Note, L. R. A., 1915 D, 458;
6 R. C. L., pp. 112-113;
12 C. J., p. 786.

SECOND COUNTER PROPOSITION TO PLAINTIFF IN ERROR'S THIRD PROPOSITION.

The ordinance in question cannot be held unconstitutional, because administered in a discriminatory manner.

AUTHORITIES.

Crossman vs. City of Galveston, 204 S. W., 128, 132;
City of Beatrice vs. Wright, 101 N. W. (Neb.), 1039, 1041;
6 R. C. L., p. 432.
And cases cited under preceding proposition, *supra*.

THIRD COUNTER PROPOSITION TO PLAINTIFF IN ERROR'S THIRD PROPOSITION.

The allegation that others violate these criminal ordinances with impunity does not entitle plaintiff to violate same, but merely indicates neglect by those charged with their enforcement, and does not show inequality or discrimination in the ordinances or their enforcement.

AUTHORITIES.

Chimine vs. Baker, 75 S. W., 330, 333;
Town of Brunson vs. Youmans, 56 S. E. (S. C.), 651;
Sylvania vs. Hilton, 2 L. N. S. (Ga.), 483, 486;
State vs. Sugarman, 52 L. R. A. (N. S.) (Minn.) 999, 1004;
Hickman vs. State, 141 S. W. (Cr.), 973, 974;
Vick vs. State, 69 S. W. (Cr.), 156, 157;
Smith vs. State, 90 S. W. (Cr.), 37, 38;
Bolln vs. State, 71 N. W. (Neb.), 444, 448;
Everhart vs. People, 130 Pac. (Col.), 1077, 1081;
16 C. J., pp. 87, 98.

FOURTH COUNTER PROPOSITION TO PLAINTIFF IN ERROR'S THIRD PROPOSITION.

The XIV Amendment of U. S. Constitution does not guarantee to violators of the law an equality in failure of duty on the part of those charged with its enforcement, so that if one violates a valid criminal law the fact that others may have been permitted to do so with impunity cannot exculpate him.

AUTHORITIES.

Chimine vs. Baker, 75 S. W., 330, 333;
Hickman vs. State, 141 S. W., 973, 974;
Vick vs. State, 69 S. W., 156, 157;
Smith vs. State, 90 S. W., 37, 38;
16 C. J., pp. 87, 98.

ARGUMENT UNDER PLAINTIFF IN ERROR'S FIRST PROPOSITION (*Her Brief, p. 17*) AND DEFENDANT IN ERROR'S COUNTER-PROPOSITION THERETO (*Ante, p.* 12).

Plaintiff in Error's first proposition concerns only one of the several ordinances in question,—or, as opposing counsel would doubtless say, *a part only* of the one ordinance,—viz: Sections 1 to 3. The gist of these sections is set out on page 4 of this brief and copied verbatim in the petition (Record, p. 5).

With reference to this ordinance plaintiff in error contends that it commits to the arbitrary discretion of the Board of Health a determination of the necessity of a vaccination requirement, and also the details of such requirement, without laying down any rule relative to these matters. The case of Yick Wo. vs. Hopkins, 118 U. S., 356, is in this connection quoted at length by plaintiff (Her Brief, p. 42), but far from supporting her contention it furnishes a typical instance of the proper application of the abstract

rule that effectually differentiates that case from the one at bar.

This ordinance lays down, as the prescribed event upon which it is to become effective, the necessity to the public health of the requirement of vaccination, and commits to the Board of Health a determination of this event, as well as the details as to enforcing the requirement; and it does not confer upon the board any arbitrary power. It is in itself a complete legislative act, requiring vaccination if "necessary for the public health," and delegating to the Board of Health the discretion to determine this necessity —thereby bringing the ordinance into effect,—and to enforce its provisions through proper regulation, and it does not constitute a delegation of legislative power. Unlike the laws involved in the cases cited by plaintiff in error (her Brief, p. 18), this ordinance, as remarked in the opinion of the State Court of Civil Appeals herein:

> "—nowhere in its terms permits a discrimination allowing the board to say which student or person attending shall be vaccinated or not."

It is well settled that it is not necessary that statutes and ordinances prescribe a specific rule of action, for some situations require the vesting of some discretion in public officials, as, for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule, or the discretion relates to administration of a police regulation and is necessary to protect the public morals, health, safety and general welfare.

How could the ordinance without frustrating its own important and only purpose—the protection of the public health, especially the school children—undertake to prescribe the definite rule that when one case of smallpox occurs, either in a particular school or in the community, vaccination may be enforced? Might not the prevalence of the disease in the city, or just outside of the city, cause a more

reasonable apprehension of an epidemic than a single case in the city, and better justify the closing of all the schools or at least the particular ones close to the infected area? Peculiar local situations and problematical combinations of circumstances cannot be properly anticipated in legislation, and even city ordinances must be elastic enough to permit of their adjustment by administrative officers to different situations and circumstances as they arise.

As illustrative of the distinction of the cases relied upon by plaintiff in error, we would call special attention to the very full note in 12 A. L. R. 1435—see especially p. 1447. Again, in the case of Municipal Paving Co. vs. Donovan Co., 142 S. W., 644, 646, there was an ordinance prohibiting the operation of a steam engine over the streets except on rails, which was also the subject-matter of the ordinance involved in the case of Baltimore vs. Rodecke, 33 Am. Rep. (Md.), 239, much relied upon by plaintiff and quoted at length both in the Yick Wo case and in plaintiff's brief (Her Brief, p. 39). The court in the Donovan case said:

> "Nor should the ordinance be considered, we think, as conferring, or intending to confer, on the mayor a mere arbitrary power to give or withhold his consent to the use of a steam-roller on the streets of the city, not only as to places, but also as to persons. Such discretion was evidently given in the legal sense of that term to be exercised fairly and without any invidious discrimination against any one, with a view to the protection of the public against the danger incident to the operation of such a roller along a public thoroughfare. The case of Yick Wo vs. Hopkins, 118 U. S., 356 * * * and City of Baltimore vs. Radecke, 33 Am. Rep. (Md.), 239, cited by appellant in support of its contention, are distinguishable in their facts from the instant case, and do not therefore control its decision.'

The case of Portland vs. Traynor (6 A. L. R. (Ore.) 1919), 1410, 1414-16) is another recent instance in which the Yick Wo case is distinguished on this score.

Of course, it will be presumed that public officers will not act arbitrarily. Crossman vs. City of Galveston, 204 S. W., 128, 132; Municipal Paving Co. vs. Donovan, 142 S. W., 644, 646; Zucht vs. San Antonio School Board, 170 S. W., 840, 843; and in the first case cited it is said that the fact that they may do so does not render the ordinance void. But in his attempt to put before this court the claim of discrimination as between plaintiff and other children, opposing counsel has gone clearly wide of his proposition, which obviously relates, and could relate, only to the written provisions of the ordinances as to their administration, and has nothing to do with their actual administration. (Her brief, pp. 43-44).

Practically the identical question as to the first feature of discretion reposed, was decided by the Supreme Court of the United States in the Jacobsen case (197 U. S., 11, 27). The Massachusetts law there involved provided "that the board of health of a city or town, if in its opinion it is necessary for the public health or safety, shall require the vaccination and revaccination of all the inhabitants thereof." The court, speaking through Mr. Justice Harlan, said:

> " * * * The Legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the board of health, that was necessary for the public health, or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably because of their fitness to determine such questions. To invest such a body with authority over such matters was

> not an unusual, nor an unreasonable or arbitrary, requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against any epidemic of disease which threatens the safety of its members."

Even if this Board of Health ordinance were deemed void, as contended by plaintiff in error, her cause would not be furthered; for there can be no question but that Secs. 1-3, with which alone we are here concerned, are so distinct in subject-matter from the rest of the ordinances quoted in the petition that they could fall and Secs. 25-27, at any rate, would remain valid and control the result of this case. (See authorities, ante, p. 13). It is really self-evident that these several groups of sections constitute separate ordinances, and from the order in which they are pleaded, it is fair to assume that Secs. 1-3 were intended as an amendment of the prior existing ordinance (Secs. 25-27), which, not being expressly repealed by the later ordinance, would remain valid and operative. (See authorities, *ante p. 14*).

ARGUMENT UNDER PLAINTIFF IN ERROR'S SECOND PROPOSITION (*Her Brief, p.* 18) AND DEFENDANT IN ERROR'S COUNTER-PROPOSITION THERETO (*Ante, p. 14*).

By her second proposition plaintiff in error contends that the ordinances in question are in terms discriminatory as against persons attending school. In the course of argument, however, opposing counsel raises the question: "Does the charter of the city confer upon it the power and authority to require the citizens to be vaccinated regardless of whether a single case of smallpox exists?" (Her Brief, p. 34). We would respectfully suggest that this is not a matter of Federal concern, is not presented by assignments of error to this court, and the holding of the State Court of Civil Appeals thereon must be accepted as final. That court said with reference to that question and the matter of discrimination:

"We hold that the ordinance is valid; not unreasonable on the claimed ground that it operates without reference to the actual existence of a smallpox epidemic in the city; that there is no unlawful discrimination against persons attending schools, and it is not unreasonable and arbitrary, in view of the conditions in the Mexican quarter of the city and the crowding together of people in street cars, jitneys, theaters, churches, passenger depots, factories, laundries, parks, etc. * * *

"When we reach the conclusion, as we do, that these ordinances were enacted in pursuance of a grant of wise and valid power, which the Legislature expressly delegated to the city council through its charter to 'enforce vaccination,' we pronounce its validity without reference to the actual existence of smallpox or not, though appellant concedes it exists among certain Mexicans all the time. We regard it as a reasonable preventative, not open to our inquiry as to its reasonableness any more than you can inquire into the reasonableness of the act of the Legislature. They are reasonable in view of the ever-present menace to health. We cannot shut our eyes to the location of this city, with its means of communication to certain localities; and, where appellant concedes the existence of smallpox all the time in certain quarters, where the disease is ever present, and liable to quickly spread through our schools like wildfire upon the prairies, feeding upon our young and tender school children, away from the ever tender and observant eye of the parent, and then throughout the homes in the city, he must thereby concede a necessity. * * *

"If the complained of ordinance is directed at school children and attendants, composed of children whose resistance against disease and tender years prevent them from taking proper care against the ravages of smallpox, constitute a special class, dealing with all similarly situated as a protective health measure, it does not violate any principle of law, for such classification has a reasonable, if not

a commendable basis, and has been sustained time and again." (225 S. W., 272, 273).

As authority bearing on this holding, we cite the following cases:

Jacobson vs. Massachusetts, 197 U. S., 11, 25;
Stull vs. Reber, 64 Atl. (Pa.), 419, 421;
Field vs. Robinson, 48 Atl. (Pa.), 873;
Herbert vs. Demopolis, 73 So. (Ala.), 321, 323;
Bissell vs. Davison, 29 L. R. A. (Conn.), 251;
State vs. Board of Education, 81 N. E. (Ohio Sup.), 568;
Abeel vs. Clark, 24 Pac. (Cal.), 383;
French vs. Davidson, 77 Pac. (Cal.), 663;
Viemeister vs. White, 70 L. R. A. (N. Y.), 796;
Note, 17 L. R. A., (U. S.), 710;
New Braunfels vs. Waldschmidt, 207 S. W. (Sup. Ct.), 303;
H. & T. C. Ry. Co. vs. Dallas, 98 Tex., 396; 84 S. W., 648.

The contention that a school vaccination ordinance, similar to that here involved, was inconsistent with the liberties guaranteed by the Federal Constitution, was made in the case of New Braunfels vs. Waldschmidt, 207 S. W., 303, 304, and our State Supreme Court in that case remarked that such a contention had been too completely repelled by the opinion of the Supreme Court of the United States in Jacobson vs. Massachusetts, 197 U. S., 22, to justify further discussion.

The 14th Amendment was also held inapplicable to similar school ordinances in the Texas cases of Zucht vs. San Antonio School Board, 170 S. W., 840, 843, and McSween vs. Board of School Trustees, 129 S. W., 206, 208.

The test as to the constitutionality of discrimination, as put by all the authorities, lies in the reasonableness of the classification on which the discrimination is based.

The classification made by the ordinance in question in its terms embraces not only public schools but all places of education within the city, and includes not only the pupils but all the teachers, employees and all other persons attending such schools, or connected therewith—in other words, all persons coming in contact with the children. There are admittedly no other vaccination ordinances, and, therefore, there is none applicable to all of the people in the city.

The classification here made has been upheld as non-discriminatory in numerous decisions. With reference to a state statute requiring vaccination of children in public schools only, it was said in the case of Abeel vs. Clark (24 Pac. (Cal.), 383, 384):

> "An act, to be general in its scope, need not include all classes of individuals in the state. It answers the constitutional requirement if it relates to and operates uniformly upon the whole of any single class, as we are satisfied the act before us does."

In another California case the same statute was again held valid as against the claim of discrimination, the court saying:

> "The Legislature, no doubt, were of opinion that the proper place to commence in the attempt to prevent the spread of a contagion was among the young, where they were kept together in considerable numbers in the same room for long hours each day. It needs no argument to show that, when it comes to preventing the spread of contagious diseases, children attending school occupy a natural class by themselves, more liable to contagion perhaps than any other class that we can think of. This effort to prevent the spread of contagion in a direction where it might do the most good was for the benefit and protection of all the people, and there is in it no element of class legislation." (French vs. Davidson, 77 Pac. (Cal.), 663, 664.

Referring to a city ordinance requiring vaccination alone of children in the public schools, it was said in the case of Herbert vs. Demopolis (73 So. (Ala.), 321, 323):

> "It cannot be pronounced void because its effect is alone visited upon children eligible to attend the public schools therein. As a matter of classification for legislative purposes the regular congregation and numbers of children in public school buildings and on playgrounds usually provided about these schools, necessarily constitutes a condition different, with relation to hygienic circumstances, effects, and results, from that to be found in any other character of assemblage in a municipality. These differences, justifying regulatory classification, are suggested by the varying degrees of hygienic and sanitary conditions prevailing in the homes of the pupils, and by the circumstances of association and contact ordinarily present among pupils in such schools."

The principle involved in the decisions quoted is again declared in Greene vs. City of San Antonio (178 S. W., 6, 9):

> "The rule is, that a law is general and uniform in its operation and not open to attack on the ground of being class legislation *when it affects equally everyone engaged in the same business.*"

The rule is stated to like general import in the case of Both vs. City of Dallas, 179 S. W., 301, 303-4 (see also 12 C. J., p. 1128).

Since the case of Yick Wo vs. Hopkins (118 U. S., 220) is so strongly recommended by counsel, it may not be amiss to give the statement of the rule as quoted in that case from Barbier vs. Conolly (113 U. S., 27):

> "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its opera-

tion it affects all persons similarly situated, is not within the Amendment."

But plaintiff in error pleads at length that there is greater chance for contagion in the Mexican quarter of the city and among the crowds in the street cars, jitneys, theatres, churches, passenger depots, factories, laundries, parks, etc. The petition in the former Zucht case seems to have been pretty much to the same effect in this respect and the Court of Civil Appeals in that case expressly declined to determine the matter here presented, the case being decided upon the school board rule, instead of upon the ordinances. It was remarked, though, that if this matter were considered judicial notice would be taken of the fact that the danger of contagion was equally as great in the places and under the conditions specified as in the schools. (170 S. W., 840, 842, 845). The several courts in deciding the French case, *supra*, and the Herbert case, *supra*, seem to have had most of these normal conditions in mind in making their decisions; but on the theory that these are matters of judicial notice, the said courts *must* theoretically have had all of these conditions in mind—except, of course, the Mexican quarter feature, which alone of them is peculiar to San Antonio. Therefore the French and Herbert cases should be regarded as decisions upon the basis of such existing comparative conditions.

It was held by our Supreme Court in the case of Middleton vs. Texas Power Co. (185 S. W., 556, 561), that classification for the purpose of a law is a legislative function and the class will be sustained unless without any reasonable basis; and a similar holding was made by the United States Supreme Court in the same case (249 U. S., 152, 157). If, then, these ordinances were authorized by the charter, they should be sustained if their basis for classification could conceivably have seemed reasonable to the Legislature, even though such basis seems to the Court to

be unreasonable. 12 C. J., p. 1131, Note "26", p. 1139, Note "28"; 6 R. C. L., p. 114; People vs. Griswold, L. R. A., 1915 D (N. Y.), 538, 542; People vs. Metz, 24 L. R. A. (N. S.) (N. Y.), 201, 208; Consumers' League vs. Ry. Co., 125 Pac. (Colo.), 577, 579).

With apparent seriousness counsel asks what valid reason could exist for selecting children and other persons attending schools as the "victims, while all the others are allowed to go free." (Her Brief, p. 34). Of course, the *essential basis of the classification is the general youth of those included and the fact that they come in daily close, personal contact at school and indoors.* As far as the validity of the ordinances is concerned the "other persons" "adults, teachers, employees, etc.) might have been omitted from its scope, but in order to make the measure practically effective and uniform they are included, thus avoiding the exposure of the children whose vaccination happens to be imperfect to the risk of infection through contact with the adults at school.

The special "*victims*" of these ordinances—the children of the community are the natural wards of the state, and entitled to the peculiar protection intended and given by these ordinances. If other reason were needed than the public policy which fosters the manhood and womanhood of tomorrow, it is found here in the peculiar susceptibility of the child to disease, his natural ignorance of its danger and characteristic heedlessness of the simplest precautions against it. In spite of those who like counsel question the propriety of legislation specially protecting children, the state of Texas has gone ahead in the march of civilization, and has its child labor laws, and even a special bureau of child and animal protection. (Revised Statutes of 1911, Title 21 A). As specially applicable to the facts here in hand, our Sanitary Code recognizes in no less than six of its rules, a special protection against disease to be given

to schools (Rules 25, 26-31) and of them, Rule 27 specially relates to smallpox and Rule 28 to both smallpox and vaccination. (Ch. 2, Title 66, Revised Statutes of Texas of 1911). For from denying to children an equal protection with adults, such laws as these have attached give them the benefit of the special protection to which they are entitled. As said in 6 R. C. L., p. 394:

> "Minors are peculiarly entitled to legislative protection, and form a class to which legislation may be exclusively directed without falling under constitutional prohibition of special legislation and unfair discrimination."

See also Sturges vs. Beauchamp, 231 U. S., 320, 326.

The petition alleges that the city council in enacting these ordinances arbitrarily discriminated against the class created by them, but, of course, the good faith or motives of that body with respect to its legislative acts are not open to inquiry, so that these allegations of plaintiff are simply surplusage. Gray vs. Lumber Co., 197 S. W., 201, 203; Houston Electric Co. vs. Mayor of Houston, 213 S. W., 198, 200; Schmidt vs. Indianapolis, 14 L. R. A. (N. S.) (Ind.), 787, 791; McQuillin on Municipal Ordinances, paras. 181, 182.

It is perhaps true that the danger of contagion is as great in the crowded street cars, theatres, factories, etc., as in the schools; and is perhaps even greater in the Mexican quarter of the city. An entirely sufficient answer to this, though, would be that the classification of school children being itself proper and reasonable, the fact that it might have been wise to make the scope of ordinances more comprehensive would not invalidate ordinances including only a proper class for protection. 12 C. J., pp. 1158-61; 6 R. C. L., pp. 164-6. As aptly said by Mr. Justice Hughes in the case of Miller vs. Wilson (236 U. S., 373-384), in answering a similar contention as to alleged discriminatory

omissions of some women workers in a female labor law:

> "If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied."

But even if there be a parity of danger among these classes slighted by the ordinances and the one actually protected, are there no other considerations that would justify a distinction? The essential distinction is that none of the classes mentioned is characterized by the general youth of those attending school. There may be many children in the Mexican quarter and among the theatre and other crowds mentioned, but they are consistently in the minority. Another important distinction is that the crowds in the street cars, jitneys, theatres, passenger depots and parks are wholly casual—not the same persons in daily contact with each other, as in the schools.

With the exception of factories and laundries, where the child labor law protects by excluding children, vaccination could not be practically enforced in any of the places mentioned. Would one seeking admittance to a theatre be required to exhibit his certificate of vaccination; and would this matter be confided to the show proprietor, or would more responsible authorities handle it? Could vaccination be required in the Mexican quarter and not in other residence quarters of the city? Could this quarter be exactly defined, and would it not be possible to show just as bad sanitary conditions in certain isolated spots elsewhere in the city? Clearly an ordinance applicable only to the Mexican quarter would be an illegal discrimination against that quarter, and therefore void. There could be no conceivably practical way of protecting all the children of the city in general, but this is virtually accomplished through the assistance of the Texas Compulsory Education Law, which brings most children within the operation of these

ordinances (Arts. 1513 ff, Revised Statues of 1911). Thus there is protected by these ordinances that special class—school children—who are naturally most entitled to protection, who have less resistance to disease and are by nature less careful than adults, and who are brought in daily close physical contact indoors.

ARGUMENT UNDER PLAINTIFF IN ERROR'S THIRD PROPOSITION AND DEFENDANT IN ERROR'S COUNTER-PROPOSITIONS THERETO. (*Her Brief, p. 20; ante, p. 16*).

Plaintiff in error's third proposition is a paraphrase of the case of Yick Wo vs. Hopkins, 118 U. S., 356. Counsel seems to urge that the alleged discrimination between plaintiff and other school children in the enforcement of these ordinances was itself unconstitutional,—not that it rendered the ordinances unconstitutional. Neither construction fits our case, but the second, rather than the first, is in our judgment the theory of the Yick Wo decision.

This case was a *habeas corpus* proceeding following arrest of Yick Wo for violation of an ordinance of San Francisco providing that it should be unlawful for any person to be in the laundry business *without having first obtained consent of the supervisors*, except that same be located in a building constructed of brick or stone. It was held that such ordinance conferred a naked arbitrary power to give or withhold consent, and made all engaged in such business the tenants at will as to their means of living under the supervisors. The practical working of this ordinance in San Francisco, as shown in this case caused the virtual exclusion of the Chinese from the laundry business, it appearing that two hundred of them had been refused permits, while the others were granted permits. It was said: "Though the law itself be fair on its face and impartial in appearance, yet if it be applied and administered by pub-

prohibiting the keeping of hogs within the town, it was pertinently said:

> "If the object of the testimony was to show inequality and discrimination by proving that others in the town kept hogs therein and were not prosecuted, that would merely go to show neglect of duty on the part of officials and not inequality and discrimination in the ordinance."

Again in the case of Silvania vs. Hilton, 2 L. R. A. (N. S.) (Ga.), 483, 486, it was said by Judge Lumpkin, *arguendo*, with reference to a fire-limit ordinance:

> "If an ordinance is plain, clear and unambiguous, it needs no aid from parol evidence for its proper construction. In such event the mere fact that it has been violated several times or many times would afford no excuse or reason for another violation, nor would it confer any right on others to violate it. To illustrate: If an ordinance prohibited the shooting of fire-arms within the corporate limits, upon the trial of one who violates it, the fact that others had committed a like breach of the ordinance, and had gone unpunished, would furnish no defense to him. So it is also in regard to a state law. It would be no defense to one tried for larceny to show that many other larcenies had been committed and the criminal had escaped without prosecution or punishment, although known.'

No contention is made that the ordinances in question in this case are not plain and unambiguous, so that in determining their validity there can be no occasion to look to their interpretation in administration.

As said in 6 R. C. L., p. 432:

> "Although as a general rule, a law cannot be held unconstitutional because, while its just interpretation is consistent with the Constitution, it is unfaithfully administered by those who are charged

> with its execution, it is, nevertheless, an equally well established principle that a provision not objectionable on its face may be adjudged unconstitutional because of its effect in operation."

To an application of this latter doctrine in the text is cited the Yick Wo case; and this is really the full extent of that case.

This brings us around to the other aspect of plaintiff in error's proposition—that the ordinances as distinguished from the acts of the defendants thereunder, are unconstitutional because administered with discrimination, or, as properly applied in the Yick Wo case, because of their necessary effect in operation.

It is held in the opinion of the state court in this case:

> "That there are other violations of the act by officers whose duty it is to enforce them (the ordinances) cannot be regarded as a reason to declare the law invalid. Its validity is a shield to those acting within its scope."

As said in the case of Crossman vs. City of Galveston (204 S. W., 128, 132), "that the board of commissioners may act arbitrarily under the authority granted by the city charter or the ordinance does not render the ordinance void."

Since the XIV Amendment in its terms applies to *state laws only*, it is essential in considering the validity of these ordinances to treat them as statutes enacted by the Legislature. Atlantic Coast Line Ry. Co. vs. Goldsboro, 232 U. S., 548, 555.

What then is the full scope of a court's inquiry in passing on the constitutionality of a law?

In the case of Judkins vs. Robinson, 109 Texas 6, Judge Phillips said:

"It is a familiar maxim that a legislative act is not to be declared unconstitutional unless it is clearly so.

"It is also an accepted rule that the necessary effect and operation of a statute may be considered in determining its validity; but a court is not permitted to look beyond the face of the statute to ascertain such effect and operation, since the intention of a statute is that expressed in its terms, and its effect is to be determined accordingly. * * * Not many statutes would withstand so exact and yet so variable a test, as most of them are capable of abusive or perversive administration. The only safe or just rule for courts to follow, therefore, is that which determines the validity of a law *according to its written words and its necessary effect, as distinguished from an unexpressed purpose or a possible operation.*"

Somewhat the same idea is presented in the case of Johnson vs. Elliott, 168 S. W., 968, 971:

"To justify the courts in holding that a given act is an unwarranted invasion of the fundamental rights of the citizen and therefore beyond the police power of the state, that objection must appear from the face of the act itself, or from facts of which the courts must take judicial cognizance."

To this is cited the case of Powell vs. Pennsylvania (127 U. S., 678), in which the court, speaking through Mr. Justice Harlan, said:

"* * * As it does not appear upon the face of the statute, or from any facts of which the court must take official cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. * * * 'In many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of

the public judgment, exercised either in the pressure of public opinion or by means of the suffrage." Yick Wo vs. Hopkins, 118 U. S., 370. * * * If all that can be said of this legislation is that it is unwise or unnecesarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

Again, in the case of State vs. Nelson, 26 L. R. A. (Ohio), 317, 320, it is said:

"While a statute must stand or fall by its operation rather than by its mere form, yet in passing upon the constitutionality of a statute, a court can judge of its operations only through facts of which it can take judicial notice. A court cannot take testimony to determine the operation of a statute, and thereby declare it unconstitutional."

A fuller statement of the rule is found in 6 R. C. L., pp. 112-113:

"The constitutionality of a law is not to be determined on a question of fact to be ascertained by the court. If under any possible state of facts an act would be constitutional, the courts are bound to presume that such facts exist; and, therefore, the courts will not make a separate investigation of the facts or attempt to decide whether the legislature has reached a correct conclusion with respect to them. Accordingly the validity of an enactment cannot be made to depend on the facts found on the trial of the first case involving the validity of such statute. If the rule were otherwise, the trial of the main issue would necessarily be delayed until the preliminary facts on which the validity of the contested legislative act depended should be first tried and determined on testimony; and since this testi-

> mony might be different in different cases, there would be involved an absurdity of declaring the law constitutional one day and unconstitutional the next."

In defining the scope of judicial inquiry with reference to the constitutionality of a law, it is said in 12 C. J., p. 786:

> "Whether or not a particular statute is constitutional is a matter of law, and must be tested not by what has been done under it, but by what the law authorizes to be done under its provisions." (See also authorities, ante, p. 16).

Opposing counsel can hardly contend that these ordinances, *according to their necessary effect and in the light of such facts of common knowledge as this court will take judicial notice of,* show an unlawful discrimination as between plaintiff and all other pupils; conceding this, there is nothing else left to his proposition, or to the sweeping charges of discrimination in operation," as contained in paragraphs 10, 15, 20 and 24 of the petition in trial court.

As against this counsel might urge:

> "That because facts alleged are admitted by demurrer, the conditions set up in the petition should for the purpose of determining the validity of the law be taken as true?"
>
> "This position is untenable. The law must be tested as to its constitutionality by its language in the light of such matters as the court will take judicial notice of." State vs. Achibold, 131 N. W. (Wis.), 895, 898.

A general demurrer, however, under Texas practice, admits the truth only of allegations of matters proper to put before the court—not of legal conclusions. Conclusions as to the authority of an officer or the invalidity of a law,

are not admitted by a general demurrer unless sustained by the facts well pleaded. Connor vs. Sanders, 81 Tex., 633, 636; Holman vs. Criswell, 13 Tex., 38, 44; Sanders State Bank vs. Hawkins, 142 S. W., 84, 88.

There are several exceptional cases, like the Yick Wo case, where apparently valid criminal laws have been held unconstitutional because of their practical operation proving them in necessary effect unconstitutional; there are a few instances in which public officers have been restrained from violating constitutional rights under color of valid laws; there are a number of cases where public officers have been restrained from violating property rights under the letter of unconstitutional criminal laws; but if a public officer acts according to the letter of a valid criminal law, as is the situation here, such law necessarily stands between him and any attack on account of such act, and any showing that he may have theretofore habitually failed to enforce such law can furnish no ground for compelling him to again fail in such duty, or for annulling the law, or for exempting one from the consequences of violating same. What plaintiff asks in this case is not an equal protection of the laws, but an *equal immunity* from them—a practical annulment of a valid law. The "immunities" guaranteed by the first clause of the XIV Amendment are such only as fundamentally belong to citizens and do not include the right to violate penal laws with impunity. Loeb vs. Jennings, 67 S. E. (Ga.), 101, 104.

The petition alleges that defendants in error conspired together to expel plaintiff from school, and acting wantonly and maliciously, refused to permit her to attend school without vaccination, and in these matters pretended to have acted in their official capacities and professed to have acted in obedience to the ordinance; these allegations being made in connection with the claim of a discrimination as between plaintiff (and her brother) and other school children. (Pet.,

paras. 17-20, Record, pp. 7-9). Now could this charge of a malicious discrimination make any difference as affecting the constitutionality of the acts of defendants in error? Certainly not, if such alleged malicious discrimination stood justified by valid ordinances in compliance with the terms of which defendants admittedly acted and were required to act in this instance.

Precisely what the defendants in error did under the ordinances is not definitely alleged and so must be inferred from their ordinary official functions in connection with such ordinance. Dr. King was the "Health Officer, City Physician and Active Manager of the Board of Health," Scholz "The Business Agent" of the San Antonio School Board, and Johnson the principal of the particular school attended by the plaintiff, and the rest of the defendants, it appears from the petition, were "members of and constitute the San Antonio School Board having the exclusive control and management of Public Free Schools in said San Antonio Independent School District." (Pet., para. 18, Record, pp. 7-8). Thus it must follow that Dr. King acted either under Section 2 of this ordinance, as a member of the Board of Health, in requiring vaccination in the school attended by plaintiff, or else, under Section 26, he must have refused a certificate of vaccination to plaintiff, *who alleges that she never has been vaccinated and is not willing to be.* In the latter event his action was purely perfunctory under section 26, upon plaintiff's failure to furnish him with a certificate of vaccination, and was therefore ministerial. In the event his action was as a member of the Board, involving the exercise of discretion as to the necessity of requiring vaccination, it was plainly a quasi-judicial function performed by him. Rains vs. Simpson, 50 Texas, 495, 501.

On the other hand, it is clear that if the members of the Board of Education "profess" to have acted in obedience to

this ordinance in excluding plaintiff, etc., they must, under the terms of section 25-27, have refused to permit plaintiff to attend the public schools of San Antonio *because she did not present to the principal of her school certified certificate of vaccination from the City Physician.* As to the propriety of action upon the part of the Board, or the action of the principal in the premises, there can be no question, for the ordinance gave them absolutely no discretion, but on the contrary, if they had taken it upon themselves to decide that it was expedient to admit plaintiff without the required certificate, clearly both the members of the board and the principal would have rendered themselves liable to the penalty for violating the law. The ordinance prescribed and defined their duty with such precision and certainty as to leave nothing to their discretion with reference to the exclusion of a pupil not presenting the required certificate (as would necessarily be plaintiff's case—never having been vaccinated, as she alleges)—and consequently, their action in expelling plaintiff was merely perfunctory and purely ministerial. They, along with persons running private schools, were more servile to the terms of this ordinance than the plaintiff herself, and just as much liable to the penalty for their violation as her parents.

There is no suggestion in the petition that defendants in error, in expelling plaintiff, exceeded the powers conferred upon them by the ordinances, nor that they went beyond the duty imposed upon them thereby, but the issue is simply whether, if derelict in their duties in other instances, defendants could be compelled to violate the law in respect to plaintiff, and whether their alleged malice, as against plaintiff, would render such discrimination on their part unlawful.

As for Dr. King's discretionary act as a member of the Board of Health, the case of Sanders State Bank vs. Hawkins, 142 S. W., 84, which was decided upon a general de-

murrer, lays down the familiar rule that the acts of a quasi-judicial officer done within the scope of his legal authority cannot be attacked because of any improper motive attaching to such act.

As to the rest of the defendants, what they did was neither misfeasance nor malfeasance, but simply a compliance with the law which would have rendered them criminally liable if they had acted otherwise. After discussing the immunity of quasi-judicial officers, Mechem in his work on Public Officers says (par. 661):

> "A somewhat similar but more absolute immunity attaches to the ministerial officer. He is by law required to act; the manner, time and circumstance of his action are prescribed; he has no discretion whether to act or not; his action could be compelled by legal process; his duty is to do, not reason why."

An interesting illustration of such immunity upon the part of an officer performing a ministerial function is found in the case of DeBolt vs. McBrien, 147 N. W. (Neb.), 462, 463, a libel suit by a school teacher against the superintendent of public instruction for a derogatory statement by plaintiff to the county superintendent. We quote from this case:

> "The theory of the trial was that if the defendant had a 'spiteful, malignant, or revengeful disposition or ill-will' against the plaintiff when he performed this duty, he would be liable to an action for damages. This is not the law. If any officer performs an act in the exercise of his office, which it is plainly his duty to perform, it may give him a pain to perform it because it injuriously affects a friend, or pleasure because it affects an enemy; such motives may be discreditable, but they cannot be inquired into in an action for damages. His duty is the same whether it affords him pain or pleasure to perform it. If a public officer is corrupt,

> and from prejudice or other vicious motives unnecessarily injures another the law generally provides means for removing him from office; but if the act complained of is in the line of his official duty, and not unlawful, the public welfare requires that he shall be free to perform his official duties without being subject to inquiry by a jury as to the condition of his mind and heart when such duties are performed. The law goes much further in the protection of an officer in the discharge of his duties than is necessary in this case. The head of an executive department is not liable in damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority, by reason of any personal or malicious motives that prompted his action. Spalding vs. Vilas, 161 U. S., 483, 40 L. Ed., 780."

In the opinion of the Supreme Court case referred to above the following forceful language was quoted from an English judge:

> "I apprehend that the motives under which a man acts in doing a duty which is incumbent upon him to do cannot make the doing of that duty actionable, however malicious they may be. I think that the law regards the doing of the duty, and not the motives from which or under which it is done. In short it appears to me that the proposition resulting from the admitted statements in this record amounts to this: Does an action lie against a man for maliciously doing his duty? I am of the opinion that it does not."

The considerations of public policy and convenience demanding immunity from damage suits extended by the Spalding case to include the heads of executive departments as well as judicial officers, it would seem should also apply in favor of an officer performing a purely ministerial

function in a definitely prescribed manner, for the non-performance of which he would be subject to a penalty under the law.

It is made an offense under Sec. 27 of the City Ordinances of the City of San Antonio for one to send an unvaccinated child to school, and it is made an offense for any and all persons to admit such child to school; this must include the principal, teacher, and school authorities. By Secs. 25 and 26 an unvaccinated child is denied the right of attendance at school. These are positive, unequivocal sections of a law, and no discretion is given to anyone with reference to their enforcement. No discretion, arbitrary or otherwise, is granted to any one to say when this law may or may not be enforced.

It must be recalled that in the final analysis of the plaintiff's pleading's the ones who expelled plaintiff from school were the officers of the San Antonio Independent School District, who had control of the schools, and that they would be subject to prosecution for permitting plaintiff to attend regardless of whether any other unvaccinated children were in attendance, and that any claim on their part, whether true or not, that such ordinance had not generally been enforced before would present no defense to their original prosecution. To force the school teachers and officers to permit an unvaccinated child to attend school would be to force them to commit a crime and to violate a criminal statute of another municipal jurisdiction over whose laws they have no control or voice in enforcement or non-enforcement.

Here we have an act of a threefold aspect in its interdiction. First, it acts directly upon the child and denies the right of attendance; next, it acts upon its guardian or parent; and third, it makes it a separate offense for a school teacher or officer of the school to permit the child to attend school unvaccinated.

From the very nature of things the health authorities do not enforce the penal ordinances of the City of San Antonio, but they are enforced through its Mayor, police and courts; and for that matter any private citizen may make complaint of the violation of any penal ordinance and bring about a trial and punishment for its violation.

If the ordinances are valid the defendants did no more than their legal duty under them in excluding plaintiff from school for want of a vaccination certificate, and, if malice prompted them to do their duty, it was nevertheless their legal and their official duty and nothing more, and the fact that they may have been derelict in such duty with reference to others in the past would not require, or even justify another dereliction.

We respectfully submit that this said cause should be dismissed by this Honorable Court because and by reason of the non-Federal question being fully determinative of and sustaining the judgments of the State Courts, but, if not dismissed, that the judgments of the State Courts should be in all things affirmed.

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ZUCHT, BY HER NEXT FRIEND, ETC. *v.* KING ET AL.

ERROR TO THE COURT OF CIVIL APPEALS, FOURTH SUPREME JUDICIAL DISTRICT, OF THE STATE OF TEXAS.

No. 84. Argued October 20, 1922.—Decided November 13, 1922.

1. A city ordinance is a law of a State within the meaning of Jud. Code, § 237. P. 176.
2. It is the duty of this Court to decline jurisdiction whenever it appears that the constitutional question upon which jurisdiction depends was not, at the time of granting the writ, a substantial question. P. 176.
3. City ordinances making vaccination a condition to attendance at public or private schools and vesting broad discretion in health authorities to determine when and under what circumstances the requirement shall be enforced are consistent with the Fourteenth Amendment and, in view of prior decisions, a contrary contention presents no substantial constitutional question. P. 176.
4. The question whether city officials have administered a valid ordinance in such a way as to deny the plaintiff the equal protection of the laws, is not one of those upon which the judgment of a state court may be brought here by writ of error. P. 177.

Writ of error to review 225 S. W. 267, dismissed.

ERROR to a judgment of the court below affirming a judgment of a trial court which dismissed the bill in a suit for injunction, mandamus and damages.

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hand there are many instances where the grant by tariffs of extensive transit or reconsignment privileges have rendered what otherwise would be independent local movements, a part of the through interstate shipment. See *In Matter of Substitution of Tonnage at Transit Points*, 18 I. C. C. 280; *The Transit Case*, 24 I. C. C. 340.

Mr. Don A. Bliss for plaintiff in error.

Mr. R. L. Ball and *Mr. A. W. Seeligson*, for defendants in error, submitted. *Mr. T. H. Ridgeway*, *Mr. Raymond Marshall*, *Mr. B. W. Teagarden* and *Mr. C. W. Trueheart* were also on the brief.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Ordinances of the City of San Antonio, Texas, provide that no child or other person shall attend a public school or other place of education without having first presented a certificate of vaccination. Purporting to act under these ordinances, public officials excluded Rosalyn Zucht from a public school because she did not have the required certificate and refused to submit to vaccination. They also caused her to be excluded from a private school. Thereupon Rosalyn brought this suit against the officials in a court of the State. The bill charges that there was then no occasion for requiring vaccination; that the ordinances deprive plaintiff of her liberty without due process of law by, in effect, making vaccination compulsory; and, also, that they are void because they leave to the Board of Health discretion to determine when and under what circumstances the requirement shall be enforced without providing any rule by which that board is to be guided in its action and without providing any safeguards against partiality and oppression. The prayers were for an injunction against enforcing the ordinances, for a writ of mandamus to compel her admission to the public school, and for damages. A general demurrer to the bill of complaint was sustained by the trial court; and, plaintiff having declined to amend, the bill was dismissed. This judgment was affirmed by the Court of Civil Appeals for the Fourth Supreme Judicial District, 225 S. W. 267; a motion for rehearing was overruled; and an application

for a writ of error to the Supreme Court of Texas was denied by that court. A petition for a writ of certiorari filed in this Court was dismissed for failure to comply with Rule 37. 257 U. S. 650. The case is now here on writ of error granted by the Chief Justice of the Court of Civil Appeals. It is assigned as error that the ordinances violate the due process and equal protection clauses of the Fourteenth Amendment; and that as administered they denied to plaintiff equal protection of the laws.

The validity of the ordinances under the Federal Constitution was drawn in question by objections properly taken below. A city ordinance is a law of the State within the meaning of § 237 of the Judicial Code as amended, which provides a review by writ of error where the validity of a law is sustained by the highest court of the State in which a decision in the suit could be had. *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 555. But, although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in character. *Sugarman* v. *United States*, 249 U. S. 182, 184. Long before this suit was instituted, *Jacobson* v. *Massachusetts*, 197 U. S. 11, had settled that it is within the police power of a State to provide for compulsory vaccination. That case and others had also settled that a State may, consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative. *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358. And still others had settled that the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law. *Lieberman* v. *Van De Carr*, 199 U. S. 552. A long line of decisions by this Court had also set-

tled that in the exercise of the police power reasonable classification may be freely applied and that regulation is not violative of the equal protection clause merely because it is not all-embracing. *Adams* v. *Milwaukee*, 228 U. S. 572. *Miller* v. *Wilson*, 236 U. S. 373, 384. In view of these decisions we find in the record no question as to the validity of the ordinance sufficiently substantial to support the writ of error. Unlike *Yick Wo* v. *Hopkins*, 118 U. S. 356, these ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health.

The bill contains also averments to the effect that in administering the ordinance the officials have discriminated against the plaintiff in such a way as to deny to her equal protection of the laws. These averments do present a substantial constitutional question. *Neal* v. *Delaware*, 103 U. S. 370. But the question is not of that character which entitles a litigant to a review by this Court on writ of error. The question does not go to the validity of the ordinance; nor does it go to the validity of the authority of the officials. Compare *Taylor* v. *Taft*, 203 U. S. 461; *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445; *Yazoo & Mississippi Valley R. R. Co.* v. *Clarksdale*, 257 U. S. 10, 16. This charge is of an unconstitutional exercise of authority under an ordinance which is valid. Compare *Stadelman* v. *Miner*, 246 U. S. 544. Unless a case is otherwise properly here on writ of error, questions of that character can be reviewed by this Court only on petition for a writ of certiorari.

Writ of error dismissed.